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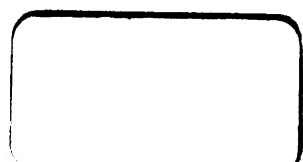
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WASHINGTON REPORTS

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CASES DETERMINED

IN THE

SUPREME COURT

OF

WASHINGTON

FEBRUARY 26, 1909—APRIL 28, 1909

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SUPREME COURT OF WASHINGTON

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TABLE
OF
CASES REPORTED

Abrams, Rayburn v.....	414
Adler v. Adler.....	539
Adler's Estate, In re.....	539
Aetna Indemnity Company, Leiendecker v.....	609
Ankeny v. Young Bros.....	235
Argo Manufacturing Company v. Parker.....	100
Aune v. Austin-Williams Timber Company.....	356
Austin, Gould v.....	457
Austin-Williams Timber Company, Aune v.....	356
 Baker v. Moeller.....	 605
Balam v. Rouleau.....	389
Baldie v. Tacoma Railway & Power Company.....	75
Bartz, Williams v.....	153
Beacon Place Company, Schlossmacher v.....	588
Bennington, Gross v.....	417
Betcher v. Brady.....	644
Bowers v. Good.....	384
Brady, Betcher v.....	644
Bridges, McDougall v.....	396
Burrows v. Williams.....	278
Bushell, Sully v.....	586
 Campbell & Company, Masoero v.....	 551
Carney v. Vogel.....	571
China Traders' Insurance Company, Norris v.....	554
Churchill, State v.....	210
Cissna, Simons v.....	115
Clambey v. Copland.....	580
Clark, Palmer v.....	345

	<i>Page</i>
Coast Land Company v. Seattle.....	380
Columbia & Puget Sound Railroad Company, Fischer v.	462
Columbia & Puget Sound Railroad Company, Pate v...	166
Coman v. Peters.....	574
Connelley v. Custer.....	697
Conroy, Kinnane v.....	651
Copland, Clambey v.....	580
Corbett v. Sloan.....	1
Cornelius v. Washington Steam Laundry.....	272
Craig, State v.....	66
Crisp, Malfa v.....	509
Cummings v. Dolan.....	496
Custer, Connelley v.....	697
Davies, Stewart v.....	96
Davis v. Lee.....	330
Davis, Mendenhall v.....	169
Davison v. Walla Walla.....	453
Dawson, Kane v.....	411
Dial v. Inland Logging Company.....	81
Dolan, Cummings v.....	496
Downing, McDonald v.....	394
Edgecomb Mill Company, Springfield Shingle Co. v..	620
Elliott v. Puget Sound Wood Products Company.....	637
Filion v. Stewart.....	682
Fischer v. Columbia & Puget Sound Railroad Company	462
Fisher, Puget Sound National Bank v.....	246
Frankfort Marine, Accident & Plate Glass Insurance Company, Puget Sound Improvement Company v....	124
Garvey v. Garvey.....	516
Gasaway v. Seattle.....	444
Gay v. Schaefer.....	269
Gerber v. Gerber.....	253
Gilson, Zent v.....	319
Golle v. State Bank of Wilson Creek.....	437

	<i>Page</i>
Gomm v. Oregon Railroad & Navigation Company....	685
Good, Bowers v.....	384
Gould v. Austin.....	457
Graves, Merritt v.....	57
Gray, Smith v.....	255
Gross v. Bennington.....	417
Gross, Norton v.....	341
Harris v. Puget Sound Electric Railway.....	289, 298, 299
Hershberg, Warren v.....	38
Hillman Investment Company, Shertzer v.....	492
Hogg v. Standard Lumber Company.....	8
Hollopeter, In re.....	41
Hoyt v. Independent Asphalt Paving Company.....	672
Independent Asphalt Paving Company, Hoyt v.....	672
Inland Logging Company, Dial v.....	81
In re Adler's Estate.....	539
In re Hollopeter.....	41
In re Milecke.....	312
In re Palmer's Will.....	644
Jacobowski, Kalinowski v.....	359
Jameson v. Kempton.....	106
Jolliffe v. Northern Pacific Railroad Company.....	433
Kalinowski v. Jacobowski.....	359
Kane v. Dawson.....	411
Kempton, Jameson v.....	106
Kennedy, Rust v.....	472
King v. Spokane.....	601
King County v. Whittlesey.....	206
Kinnane v. Conroy.....	651
Kitsap County v. Melker.....	49
Lance & Peters, Smyth v.....	560
Lara v. Sandell.....	53
Lee, Davis v.....	330
Leienhecker v. Aetna Indemnity Company.....	609

	<i>Page</i>
Littooy, State v.....	87
Long v. McCabe & Hamilton.....	422
Long Jim, Starr v.....	138
 McCabe & Hamilton, Long v.....	 422
McDonald v. Downing.....	394
McDougall v. Bridges.....	396
McManus, Rust v.....	699
McNaught-Collins Improvement Company v. May.....	632
McPhee v. United States Fidelity and Guaranty Co....	154
Malfa v. Crisp.....	509
Manhattan Building Company v. Seattle.....	226
Marshall, Stone v.....	375
Masoero v. Campbell & Company.....	551
May, McNaught-Collins Improvement Company v.....	632
Mead, State ex rel. Case v.....	533
Melker, Kisap County v.....	49
Mendenhall v. Davis.....	169
Merritt v. Graves.....	57
Milecke, In re.....	312
Moeller, Baker v.....	605
Murphy, Title Guaranty & Trust Company v.....	190
 National Cash Register Company v. Wapples.....	 657
Nelson v. Title Trust Company.....	258
Nelson v. Western Steam Navigation Company.....	177
Nicomen Boom Company, North Shore Boom & Driving Company v.	564
Norris v. China Traders' Insurance Company.....	554
North American Commercial Company v. North Amer- ican Transportation and Trading Company.....	502
North American Transportation and Trading Company, North American Commercial Company v.....	502
Northern Pacific Railroad Company, Jolliffe v.....	433
Northern Pacific Railway Company, Pierson v.....	595
Northern Pacific Railway Company, Windmiller v.....	613
North Shore Boom & Driving Company v. Nicomen Boom Company	564

CASES REPORTED.

ix

	<i>Page</i>
Norton v. Gross.....	341
Nunn v. Stewart.....	518
Oregon Railroad & Navigation Company, Gomm v....	685
Osborne v. Seattle.....	323
Pacific Coast Steamship Company, Nelson v.....	177
Palmer v. Clark.....	345
Palmer's Will, In re.....	644
Parker, Argo Manufacturing Company v.....	100
Passage v. Stimson Mill Company.....	661
Pate v. Columbia & Puget Sound Railroad Company...	166
Peters, Coman v.....	574
Pierce v. Pierce.....	679
Pierson v. Northern Pacific Railway Company.....	595
Puget Sound Electric Railway, Harris v.....	289, 298, 299
Puget Sound Electric Railway, Wilson v.....	522
Puget Sound Improvement Company v. Frankfort Ma- rine, Accident & Plate Glass Insurance Company....	124
Puget Sound National Bank of Seattle v. Fisher.....	246
Puget Sound Wood Products Company, Elliott v.....	637
Railroad Commission, State ex rel. Great Northern Rail- way Company v.....	33
Railroad Commission, State ex rel. Northern Pacific Railway Company v.....	440
Railroad Commission, State ex rel. Oregon Railroad & Navigation Company v.....	17, 696
Ramsey v. Wilson.....	111
Rangenier v. Seattle Electric Company.....	401
Rayburn v. Abrams.....	414
Regan & Company, Seattle v.....	262
Rouleau, Balam v.....	389
Rust v. Kennedy.....	472
Rust v. McManus.....	699
Sandell, Lara v.....	53
Schaefer, Gay v.....	269
Scherrer v. Seattle.....	4

	<i>Page</i>
Schlossmacher v. Beacon Place Company.....	588
Seattle, Coast Land Company v.....	380
Seattle, Gasaway v.....	444
Seattle, Manhattan Building Company v.....	226
Seattle, Osborne v.....	323
Seattle v. Regan & Company.....	262
Seattle, Scherrer v.....	4
Seattle Electric Company, Rangenier v.....	401
Shertzer v. Hillman Investment Company.....	492
Simmons, State v.....	132
Simons v. Cissna.....	115
Sloan, Corbett v.....	1
Smith v. Gray.....	255
Smith v. Spokane Falls & Northern Railway Company.	350
Smyth v. Lance & Peters.....	560
Spencer, Walla Walla Fire Insurance Company v.....	369
Spokane, King v.....	601
Spokane Falls & Northern Railway Company, Smith v.	350
Springfield Shingle Company v. Edgecomb Mill Co....	620
Standard Lumber Company, Hogg v.....	8
Starr v. Long Jim.....	138
State v. Churchill.....	210
State v. Craig.....	66
State v. Littooy.....	87
State v. Simmons.....	132
State v. Stewart.....	61
State ex rel. Case v. Mead.....	533
State ex rel. Dominick v. Superior Court, King County	196
State ex rel. Great Northern Railway Company v. Rail- road Commission of Washington.....	38
State ex rel. Mann v. Superior Court, Thurston County	149
State ex rel. Northern Pacific Railway Company v. Rail- road Commission of Washington.....	440
State ex rel. Oregon Railroad & Navigation Company v. Railroad Commission of Washington.....	17, 696
State ex rel. Pugh v. Superior Court, Spokane County	484
State ex rel. Trickel v. Superior Court, Clallam County	13

CASES REPORTED.

xi

	<i>Page</i>
State Bank of Wilson Creek, Golle v.....	437
Stewart v. Davies.....	96
Stewart, Filion v.....	682
Stewart, Nunn v.....	513
Stewart, State v.....	61
Stimson Mill Company, Passage v.....	661
Stone v. Marshall.....	375
Sullivan v. Sullivan.....	160
Sully v. Bushell.....	586
Superior Court, State ex rel. Dominick v.....	196
Superior Court, State ex rel. Mann v.....	149
Superior Court, State ex rel. Pugh v.....	484
Superior Court, State ex rel. Trickel v.....	13
Tacoma Railway & Power Company, Baldie v.....	75
Tausick v. Tausick.....	301
Title Guaranty & Trust Company v. Murphy.....	190
Title Trust Company, Nelson v.....	258
United States Fidelity and Guaranty Co., McPhee v...	154
Verhaest, Wiley v.....	475
Vogel, Carney v.....	571
Walla Walla, Davison v.....	453
Walla Walla Fire Insurance Company v. Spencer.....	369
Wapples, National Cash Register Company v.....	657
Warren v. Hershberg.....	38
Washington Steam Laundry, Cornelius v.....	272
Western Steam Navigation Company, Nelson v.....	177
Whittlesey, King County v.....	206
Wiley v. Verhaest.....	475
Williams v. Bartz.....	153
Williams, Burrows v.....	278
Wilson v. Puget Sound Electric Railway.....	522
Wilson, Ramsey v.....	111
Windmiller v. Northern Pacific Railway Company.....	613
Young Bros., Ankeny v.....	235
Zent v. Gilson.....	319

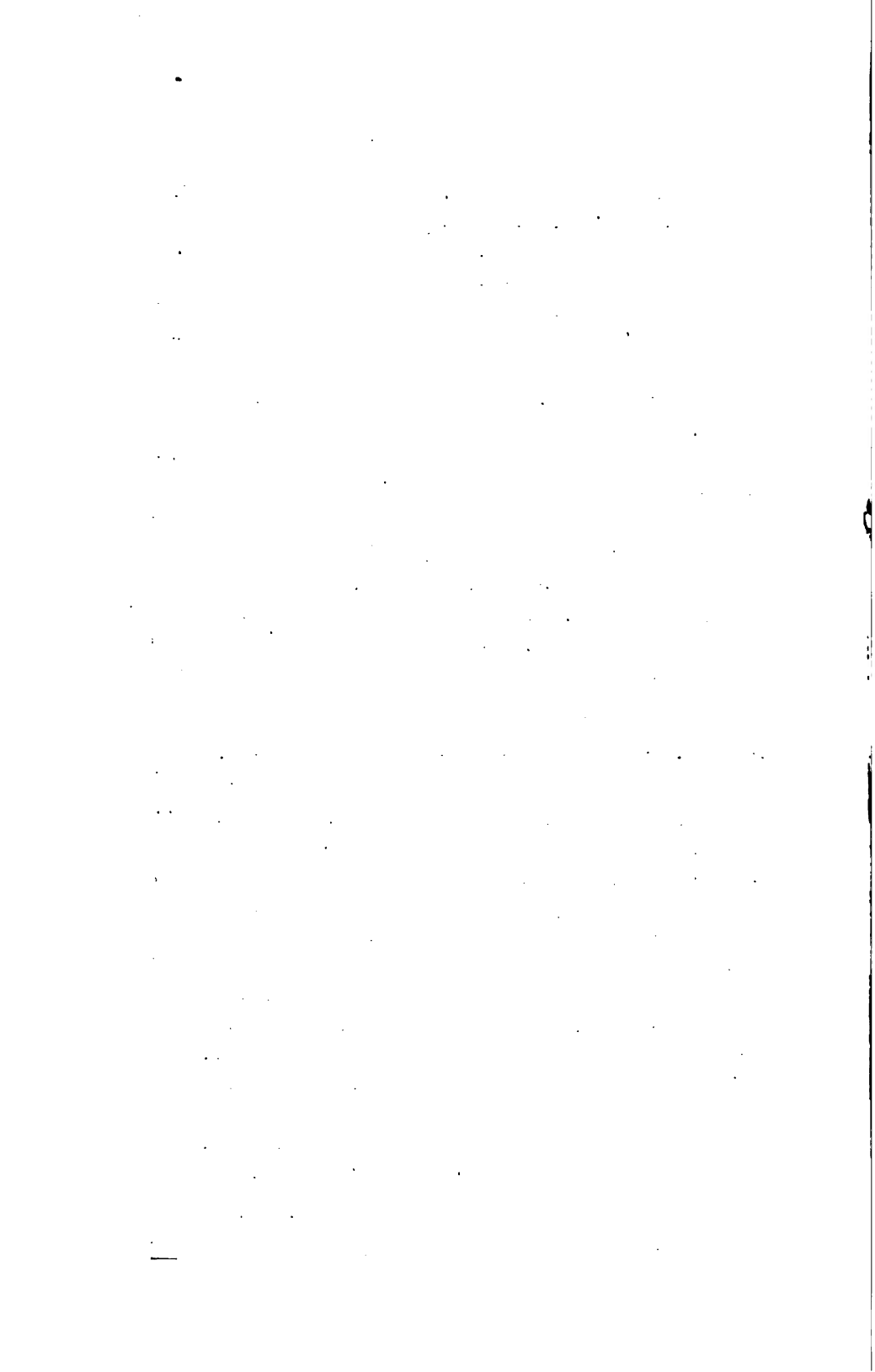


TABLE OF CASES CITED BY THE COURT.

	<i>Page</i>
Abby v. Wood.....	43 Wash. 379..... 406
Adams v. State.....	47 Tex. Cr App. 347..... 222
Adams County v. Dobschlag.....	19 Wash. 356..... 51
Aigen v. Boston & M. R. Co.....	132 Mass. 423..... 693
Allen v. Aetna Life Ins. Co.....	145 Fed. 881..... 132
Allen v. Gilman, McNeill & Co.....	137 Fed. 136..... 132
Allen & Gilbert-Ramaker Co. v. Ca-	
nadian Pac. R. Co.....	42 Wash. 64..... 616, 688, 690
Allen v. McKay.....	120 Cal. 332..... 56
Allen v. Peterson.....	38 Wash. 599..... 473
American Board of Com'rs v. Nelson	72 Ill. 564..... 543, 544
American Bonding Co. v. Loeb.....	47 Wash. 447..... 266
Ames v. Farmers & Mechanics Bank	48 Wash. 328..... 181
Anderson v. McGregor.....	36 Wash. 124..... 553
Andrews v. United States.....	162 U. S. 420..... 94
Ankeny v. Clark.....	1 Wash. 549..... 337
Appeal of Jenkins.....	25 Ind. App. 532..... 158
Armstrong v. Moore.....	1 Kan. App. 450..... 450
Ashelford v. Willis.....	194 Ill. 492..... 367
Asher v. Cabell.....	50 Fed. 818..... 157, 158
Askam v. King County.....	9 Wash. 1..... 51
Atchinson etc. R. Co. v. Johnson..	3 Okl. 41..... 468
Atchison etc. R. Co. v. Lindley....	42 Kan. 714..... 470
Atchison etc. R. Co. v. Roach.....	35 Kan. 740..... 691
Atkinson v. Bell.....	18 Tex. 474..... 147
Baizer v. Lasch.....	28 Wis. 268..... 15
Baldwin v. Brown.....	48 Wash. 303..... 338
Ballard v. Ross.....	38 Wash. 209..... 452
Baltimore & O. R. Co. v. Campbell..	36 Ohio St. 647..... 693
Baltimore & O. R. Co. v. Campbell..	3 R. R. Cas. 246..... 693
Baltimore etc. R. Co. v. Reaney...	42 Md. 117..... 354
Bank of America v. Banks.....	101 U. S. 240..... 147
Bank of California v. Dyer.....	14 Wash. 279..... 277
Barnes v. Packwood.....	10 Wash. 50..... 387
Baumgartner v. Hasty.....	100 Ind. 575..... 455
Beatty v. Davenport.....	45 Wash. 555..... 680, 682
Bell v. Spokane.....	30 Wash. 508..... 604

	<i>Page</i>
Bellingham Bay Imp. Co. v. New	
Whatcom	20 Wash. 53..... 32
Benedict, Hall & Co. v. Renfro Bros.	75 Ala. 121..... 320
Berg v. Atchison etc. R. Co.....	30 Kan. 561..... 692
Blake v. Shriver.....	27 Wash. 593..... 114
Blakely v. Sousa.....	197 Pa. St. 305..... 173
Blalock v. Condon.....	51 Wash. 604..... 54
Blumauer v. Clock.....	24 Wash. 596..... 563
Board of Com'rs of Boone County v.	
Mutchler	137 Ind. 140..... 531
Boering v. Chesapeake Beach R. Co.	193 U. S. 442..... 293
Born v. Spokane.....	27 Wash. 719..... 604
Bowers v. Ledgerwood.....	25 Wash. 14..... 593
Bradburn v. Whatcom County R. &	
L. Co.	45 Wash. 582..... 299
Brady v. State.....	43 Tex. Cr. App. 76.... 220, 221
Bray v. State.....	140 Ala. 172..... 316
Brennan v. Schellhamer.....	13 N. Y. S. 558..... 336
Brennan v. Seattle.....	39 Wash. 640..... 264
Brennan v. Seattle.....	46 Wash. 427..... 264, 266
Bridge v. Wain.....	1 Stark. 504..... 627
Brown v. Baldwin.....	46 Wash. 106..... 519
Brown v. Clark.....	89 Cal. 196..... 56
Brown v. Republican Mountain Sil-	
ver Mines	17 Colo. 421..... 85
Brown v. Scherrer.....	5 Colo. App. 255..... 542
Brush v. Wilkins.....	4 Johns. Ch. 506.542, 546, 548
Burgert v. Caroline.....	31 Wash. 62..... 379
Burian v. Seattle Elec. Co.....	26 Wash. 606..... 79, 528
Burke v. Fuller.....	41 La. Ann. 740..... 287
Burmeister v. Howard.....	1 Wash. Ter. 207..... 344
Burns v. Commencement Bay Land	
& Imp. Co.	4 Wash. 558..... 85
Burton v. State.....	85 Ark. 48..... 222
Butler v. Townsend.....	126 N. Y. 105..... 189
Byrd v. Surles.....	77 N. C. 435..... 543
Cable v. Spokane etc. R. Co.....	50 Wash. 619..... 528
Cahill v. Smith.....	101 N. Y. 355..... 507
Calor Oil & Gas. Co. v. Granzell....	33 Ky. Law 98..... 202
Candee v. Pennsylvania R. Co.....	21 Wis. 589..... 693
Carlson v. Curren.....	48 Wash. 249..... 519
Carney v. Vogel.....	52 Wash. 571..... 622
Carpenter v. Barry.....	26 Wash. 255..... 682
Carpenter v. Capital Elec. Co.....	178 Ill. 29..... 368
Carpenter v. Carpenter.....	30 Kan. 712..... 163
Carr v. Easton.....	142 Pa. St. 139..... 531
Carstens & Earles v. Parker.....	26 Wash. 702..... 410

CASES CITED.

xv

	Page
Carter v. Peck.....	4 Sneed 203..... 693
Caufield v. Clark.....	17 Ore. 473..... 593
Chadbourn v. Springfield St. R. Co.	85 N. H. (Mass.) 787..... 530
Chancellor v. Lopus.....	Cro. Jac. 4..... 629, 630
Chanter v. Hopkins.....	4 M. & W. 399..... 626
Chauncey v. State.....	130 Ala. 71..... 314
Chevalier & Co. v. Wilson.....	30 Wash. 227..... 395
Chezum v. Claypool.....	22 Wash. 498..... 312
Chicago etc. R. Co. v. Jones.....	149 Ill. 361..... 87
Chicago etc. R. Co. v. Michle.....	83 Ill. 427..... 467
Chicago etc. R. Co. v. Minnesota.....	134 U. S. 418..... 27
Chicago etc. R. Co. v. Sheldon.....	53 Kan. 159..... 450
Christian v. State.....	46 Tex. Cr. App. 47..... 215
Clark v. Great Northern R. Co.....	37 Wash. 537..... 285
Clum v. Barkley.....	20 Wash. 103..... 71
Coddington v. Goddard.....	16 Gray 443..... 244
Coe v. Low.....	36 Wash. 10..... 147
Colby v. Spokane.....	12 Wash. 690..... 553
Cole v. Seattle, Renton & S. R. Co..	42 Wash. 462..... 184
Coleman v. Montgomery.....	19 Wash. 610..... 655
Colfax Nat. Bank v. Davis.....	50 Wash. 92..... 231
Columbia & P. S. R. Co. v. Seattle..	33 Wash. 513..... 326, 328
Columbia Nat. Bank v. Western Iron & Steel Co.....	14 Wash. 162..... 172
Columbian Iron Works v. Douglas..	84 Md. 44..... 631
Com'rs of Boise Co. v. Gorman.....	19 Wall. 661..... 570
Connolly v. Bolster.....	187 Mass. 266..... 132
Conover v. Neher-Ross Co.....	38 Wash. 172..... 429
Considine v. Gallagher.....	31 Wash. 669..... 440
Contested Election of Brigadier Gen- eral	1 Strobb. L. (S. C.) 190.. 536
Corker v. Corker.....	87 Cal. 643..... 543
Cortland Wagon Co. v. Gordy.....	98 Ga. 527..... 322
Cowles v. United States Fidelity & Guaranty Co.	32 Wash. 120..... 193
Cox v. Tompkinson.....	39 Wash. 70..... 379
Crane v. Elizabeth.....	36 N. J. Eq. 339..... 450
Croke v. American Nat. Bank.....	18 Colo. App. 3..... 368
Cudahy Packing Co. v. New Amster- dam Casualty Co.	132 Fed. 623..... 130
Cunningham v. Thief River Falls...	84 Minn. 21..... 531
Curtis v. Curtis.....	46 Wash. 664..... 681
Curtis v. McCullough.....	3 Nev. 202..... 15
Curtley v. Security Sav. Society...	46 Wash. 50..... 339
Cushman v. Carbondale Fuel Co....	122 Iowa 656..... 132
Cutler v. Winsor.....	6 Pick. 335..... 187
Dabney v. Smith.....	38 Wash. 40..... 439
Daly v. Everett Pulp & Paper Co...	31 Wash. 252..... 300, 387

			<i>Page</i>
David v. Park.....	103 Mass.	501.....	340
Davis v. Seattle.....	37 Wash.	223.....	604
Davis v. Seattle Nat. Bank.....	19 Wash.	65.....	387
Decker v. Schulze.....	11 Wash.	47.....	338
Denis v. Lewiston etc. R. Co.....	70 Atl. (Me.)	1047.....	532
Denny v. Sayward.....	10 Wash.	422.....	266
Desha v. Smith.....	20 Ala.	747.....	287
Deupree v. Deupree.....	45 Ga.	415.....	543, 545
Dickinson v. Crowell.....	120 Iowa	254.....	367
Dimmick v. Collins.....	24 Wash.	78.....	294
Disbrow v. Harris.....	122 N. Y.	362.....	336
Dobschuetz v. Holliday.....	82 Ill.	371.....	277
Donald v. Ballard.....	34 Wash.	576.....	300
Doremus v. Root.....	23 Wash.	710.....	266
Dounce v. Dow.....	64 N. Y.	411.....	629
Douthitt v. MacCulsky.....	11 Wash.	601.....	114
Doyle v. Fitchburg R. Co.....	166 Mass.	492.....	296
Drucker v. Wellhouse.....	82 Ga.	129.....	322
Duff v. Alleghany R. Co.....	91 Pa. St.	458.....	470
Dumphy v. Traveller Newspaper Ass'n	146 Mass.	495.....	642
Dunklin County v. Clark.....	51 Mo.	60.....	501
Durham v. United States.....	4 Hayw. (Tenn.)	54.....	536
Duryea v. Duryea.....	85 Ill.	41.....	543, 544
Duteau v. Barto.....	48 Wash.	207.....	209
Edson v. Dillaye.....	8 How. Pr.	273.....	172
Edward's Appeal	47 Pa. St.	144.....	543, 545
Edwards County v. White County..	85 Ill.	390.....	250
Eichenlaub v. St. Joseph.....	113 Mo.	395.....	455
Eldridge v. Stenger.....	19 Wash.	697.....	399
Ellis v. Darden.....	86 Ga.	368.....	543, 545
Engelker v. Seattle Elec. Co.....	50 Wash.	196.....	532
Enos v. Wilcox.....	3 Wash.	44.....	461
Essency v. Essency.....	10 Wash.	375.....	399
Evanston v. Meyers.....	70 Ill. App.	205.....	92
Evanston v. Myers.....	172 Ill.	266.....	92
Everett Water Co. v. Powers.....	37 Wash.	143.....	365
Ex parte Dunbar.....	14 Mass.	393.....	537
Ex parte Hardy.....	68 Ala.	303.....	316
Ex parte King.....	102 Ala.	182.....	314
Fairhaven Land Co. v. Jordan.....	5 Wash.	729.....	275
Farmers & Merchants' Nat. Bank v. Mosher	63 Neb.	130.....	322
Farrel Co. v. Ihrig.....	50 Wash.	281.....	154
Felder v. Columbia etc. R. Co.....	21 S. C.	35.....	693
Fero v. Fero.....	70 N. Y. S.	742.....	48

CASES CITED.

xvii

		<i>Page</i>
Ferry v. Ferry.....	9 Wash. 239.....	312
Ferry v. King County.....	2 Wash. 337.....	583
Finch v. Noble.....	49 Wash. 578.....	379
Firebaugh v. Seattle Elec. Co.....	40 Wash. 658.....	296
First Nat. Bank of Snohomish v. Parker	28 Wash. 234.....	577
Fischer v. Woodruff.....	25 Wash. 67.....	86
Fishburne v. Merchants' Bank of Port Townsend	42 Wash. 473.....	176
Flint v. Long.....	12 Wash. 342.....	593
Flint v. Lyon.....	4 Cal. 17.....	630
Flower v. Pennsylvania R. Co.....	69 Pa. St. 210.....	469
Ford v. Heffernan Engine Works...	48 Wash. 315.....	669
Fort Street Union Depot Co. v. Mor- ton	83 Mich. 265.....	202
Foster v. Kansas.....	112 U. S. 201.....	570
Foster v. Rockwell.....	104 Mass. 167.....	244
Foster v. Taylor.....	44 Wash. 313.....	412
Francis v. State.....	55 S. W. (Tex. App.) 488..	221
Freeman v. Gloyd.....	43 Wash. 607.....	109, 340
Frye v. Bath Gas & Electric Co....	97 Me. 241.....	132
Galveston etc. R. Co. v. Kutac.....	72 Texas 643.....	532
Gaskill v. Trainer.....	3 Cal. 334.....	277
Gay v. Havermale.....	30 Wash. 622.....	462
George v. Columbia & Puget Sound R. Co.	38 Wash. 480.....	114
Gilbert Co. v. Husted.....	50 Wash. 61.....	661
Gilmore v. Skookum Box Factory..	20 Wash. 703.....	271
Globe Nav. Co. v. Maryland Casualty Co.	39 Wash. 299.....	131
Glos v. Wheeler.....	229 Ill. 272.....	56
Gonzales v. State.....	28 Tex. App. 130.....	220, 221
Gould v. Austin.....	52 Wash. 457.....	583
Graves v. Graves.....	48 Wash. 664.....	57
Graves v. Sheldon.....	2 D. Chipman (Vt.) 71..	549
Green v. Western American Co....	30 Wash. 87.....	426, 429
Griggs v. MacLean.....	33 Wash. 244.....	395
Grimm v. United States.....	156 U. S. 604.....	93
Guiteau's Case	10 Fed. 161.....	78
Hackley v. Headley.....	45 Mich. 569.....	374
Hall v. Skavdale.....	21 Wash. 203.....	414, 415
Hall v. Wright.....	1 E. B. & E. 793.....	174
Hallet v. Columbian Ins. Co.....	8 Johns. 272.....	187
Hamilton v. Witner.....	50 Wash. 689.....	55
Hammock v. Tacoma.....	40 Wash. 539.....	604
Hanson v. Eastman.....	21 Minn. 509.....	328

	<i>Page</i>
Hanson v. Tompkins.....	2 Wash. 508..... 340
Harrington v. Ward.....	9 Mass. 251..... 157
Harris v. Puget Sound Elec. R....	52 Wash. 289..... 298, 300
Harris v. Puget Sound Elec. R....	52 Wash. 298..... 300
Hart v. Pennsylvania R. Co.....	112 U. S. 331..... 617, 618, 695
Hartranft v. Oliver.....	125 U. S. 525..... 507
Harvey v. Ivory.....	35 Wash. 397..... 568
Hase v. Seattle.....	51 Wash. 174..... 5
Hatch v. Lamos.....	65 N. H. 1..... 660
Hawes v. Oakland.....	104 U. S. 450..... 643
Hawkins v. Pemberton.....	51 N. Y. 198..... 629
Hayes v. Smith.....	62 Ohio St. 161..... 408
Hecker v. Sterling.....	36 Pa. St. 423..... 250
Hedrick v. Ilwaco R. & Nav. Co....	4 Wash. 400..... 301
Helber v. Spokane Street R. Co....	22 Wash. 319..... 79
Helbig v. Grays Harbor Elec. Co..	37 Wash. 130..... 387
Heysham v. Dettre.....	89 Pa. St. 506..... 374
Higgins v. Nethery.....	30 Wash. 239..... 71
Hilborn v. Bucknam.....	78 Me. 482..... 374
Hill v. Northern Pac. R. Co.....	33 Wash. 697..... 617, 619
Hill v. Northern Pac. R. Co.....	33 Wash. 697..... 695
Hill v. Young.....	7 Wash. 33..... 480
Hindle v. Holcomb.....	34 Wash. 336..... 109
Hine v. New Haven.....	40 Conn. 478..... 455
Hoff v. Japanese-American Fertilizer & Fisheries Co.....	48 Wash. 581..... 668
Holmes v. Johns.....	56 Texas 41..... 147
Holt v. Thomas.....	105 Cal. 273..... 374
Home Savings & Loan Ass'n v. Bur- ton	20 Wash. 688..... 399
Howard v. Shaw.....	10 Wash. 151..... 86
Hubenthal v. Spokane & Inland R. Co.	43 Wash. 677..... 439
Huetter v. Redhead.....	31 Wash. 320..... 277
Hullinger v. Worrell.....	83 Ill. 220..... 157
Hutchins v. Pennsylvania R. Co....	181 N. Y. 186..... 694
Hutchinson v. Davis.....	58 Ill. App. 358..... 314
Illinois Cent. R. Co. v. Copeland...	24 Ill. 332..... 693
Indiana Iron Co. v. Cray.....	19 Ind. App. 565..... 188
Ingersoll v. Hopkins.....	170 Mass. 401..... 543
In re Barbee.....	19 Wash. 306..... 313
— Cannon's Estate	18 Wash. 101..... 480
— Casey	27 Wash. 686..... 313
— Disbarment of Luce.....	83 Cal. 303..... 322
— Gorkow's Estate	20 Wash. 563..... 71
— Guggenheim Smelting Co....	112 Fed. 517..... 508
— Hill's Estate	6 Wash. 285..... 480

CASES CITED.

xix

			Page
In re Larsen's Estate	18 S. D.	335.....	543, 545
— Nolan	21 Wash.	395.....	313
— Parsons	150 Mass.	343.....	322
— Pettridge's Will	47 Wash.	77.....	541
— Thompson	36 Wash.	377.....	89, 90
— Toepfer's Estate	12 N. M.	372.....	543, 545
Ironside v. Vinita.....	98 S. W. (Ind. Ter.)	167....	455
Irwin v. Holbrook.....	32 Wash.	349.....	387
Jacobus v. St. Paul etc. R. Co.	20 Minn.	125.....	293
Jamieson & McFarland v. Heim....	43 Wash.	153.....	681
Janin v. Browne.....	59 Cal.	37.....	173
Jensen v. Spokane Falls & N. R. Co. 51	Wash.	448.....	695
Johanson v. Washington.....	190 U. S.	179.....	112
Johnson v. Conner.....	48 Wash.	431..114, 439, 634,	635
Johnson v. Great Northern Lum. Co. 48	Wash.	325.....	209
Johnson v. Shuey.....	40 Wash.	22.....	271
Johnson v. Tacoma Cedar Lum. Co. 3	Wash.	722.....	608
Johnston v. Harrington.....	5 Wash.	73.....	275
Jones v. Seattle.....	51 Wash.	245.....	6
Jordan v. Seattle.....	26 Wash.	61.....	528
Jordan v. Seattle etc. R. Co.	47 Wash.	503.....	296
Josling v. Kingsford.....	13 C. B. (N. S.)	447.....	628
Kane v. Miller.....	40 Wash.	125.....	681
Kane v. Northern Central R.	128 U. S.	91.....	669
Kenebal v. Scrafton.....	2 East	530.....	545- 547
Kenzel v. Kirk.....	37 Barb.	113.....	187
King v. Griffiths-Sprague Stevedor- ing Co.	45 Wash.	425.....	668
King v. Rochester.....	67 N. H.	310.....	631
Kitsap County v. Melker.....	50 Wash.	29.....	50
Klingler v. Bickel.....	117 Pa. St.	326.....	455
Krebbs v. Oregon R. & Nav. Co....	40 Wash.	138.....	353
Kuhn v. Mason.....	24 Wash.	94.....	40
Lake Shore etc. R. Co. v. Brown...123	Ill.	162.....	465, 466
Lake Shore etc. R. Co. v. McIntosh.140	Ind.	261.....	531
La Rault v. Palmer.....	51 Wash.	664.....	184
Lawson v. Seattle & Renton R. Co.. 34	Wash.	500.....	184
Lawson v. Vernon.....	38 Wash.	422.....	340
Lee v. State.....	75 Ala.	29.....	316
Lemon v. Waterman.....	2 Wash. Ter.	485.....	344
Lick v. Ray.....	43 Cal.	83.....	501
Lippincott v. Rich.....	19 Utah	140.....	659
Little v. Cogswell.....	20 Ore.	345.....	36
Little v. Little.....	2 N. D.	175.....	287
Littlefield v. Dawson.....	47 Wash.	644.....	412
Little Rock etc. R. Co. v. Miles....	13 R. R. Cas.	10.....	471

			<i>Page</i>
Lohse v. Burch.....	42 Wash.	156.....	114
London & San Francisco Bank v. Oakland	90 Fed.	691.....	328
Long v. Billings.....	7 Wash.	267.....	416, 447
Long v. Long.....	38 Wash.	218.....	321
Long v. Newhouse.....	57 Ohio St.	348.....	16
Long v. Pierce County.....	22 Wash.	330.....	558
Louisville etc. R. Co. v. Creek.....	130 Ind.	139.....	531
Louisville & N. R. Co. v. Molloy's Adm'x	28 Ky. Law	1113.....	531
Love v. People.....	160 Ill.	501.....	92
Loveland v. Jenkins-Boys Co.....	49 Wash.	369.....	387
Lueders v. Tenino.....	49 Wash.	521.....	494
Lytle v. Sandefur.....	93 Ala.	396.....	501
McAnnulty v. McAnnulty.....	120 Ill.	26.....	543
Macauley v. Smith.....	132 N. Y.	524.....	584
McAvoy v. Jennings.....	44 Wash.	79.....	321
McClair v. Wilson.....	18 Colo.	82.....	374
McCowan v. Northeastern Siberian Co.	41 Wash.	675.....	294
McCready v. Thorne.....	49 Barb.	438.....	188
McCue v. Bellingham Bay Water Co.	5 Wash.	156.....	365
Mackay v. Dever.....	49 Wash.	439.....	538
McKenney v. Clarke.....	2 Swan (Tenn.)	320.....	47
McKibbin v. Fort Smith.....	35 Ark.	352.....	455
McManus v. Morgan.....	38 Wash.	528.....	474
McNamara v. Great Northern R. Co.	61 Minn.	296.....	470
McPeck v. Western Union Tel. Co.....	107 Iowa	356.....	158
McQuillan v. Seattle.....	10 Wash.	464.....	528
Macy v. Wheeler.....	30 N. Y.	241.....	187
Mader v. Jones.....	1 Russ. & Ches.	82.....	628
Marshall v. Williams.....	21 Ore.	268.....	585
Maryland Steel Co. v. Marney.....	88 Md.	482.....	354
May v. Sutherland.....	41 Wash.	609.....	114
Meacham v. Seattle.....	45 Wash.	380.....	328
Meeker v. Johnson.....	3 Wash.	247.....	357
Melchoir v. McCarty.....	31 Wis.	252.....	147
Melse v. Alaska Commercial Co.....	42 Wash.	356.....	426
Meredith v. United States.....	13 Peters	486.....	507
Merritt v. Cameron.....	137 U. S.	542.....	507
Mertz v. Detroit Elec. R.....	125 Mich.	11.....	77, 80
Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.....	16 Wall.	318.....	687
Miller v. Eccles.....	155 Pa. St.	36.....	611
Mills v. Commonwealth.....	93 Va.	815.....	63
Milnor v. New York etc. R. Co.....	53 N. Y.	363.....	693
Mobile & Ohio R. Co. v. Hopkins...	41 Ala.	486.....	293

CASES CITED.

xxi

		Page
Monro v. National Surety Co.....	47 Wash. 488.....	440
Montgomery v. Cowlitz County....	14 Wash. 230.....	344
Moody v. Spokane etc. R. Co.	5 Wash. 699.....	336
Moore v. Woodruff.....	146 Mo. 597.....	451
Morgan v. Ireland.....	1 Idaho 786.....	542
Morgan v. Morgan.....	10 Wash. 99.....	306, 312
Morgan v. Northern Pac. R. Co....	50 Wash. 480.....	114
Morrell v. Miller.....	28 Ore. 354.....	321
Morris v. Whitchee.....	20 N. Y. 41.....	335
Morse v. Moore.....	83 Me. 473.....	626
Muldoon v. Seattle City R. Co.....	7 Wash. 528.....	293
Murray v. Ellston.....	24 N. J. Eq. 310.....	287
Myrick v. Michigan Cent. R. Co....	107 U. S. 102.....	688
National Bank v. Matthews.....	98 U. S. 621.....	249
National Bank v. Whitney.....	103 U. S. 99.....	249
National Cash Register Co. v. Petsas	43 Wash. 376.....	661
New Amsterdam Casualty Co. v. Cumberland Tel. etc. Co.....	152 Fed. 961.....	130
New York etc. R. Co. v. Ketchum...	27 Conn. 169.....	85
Nicomen Boom Co. v. North Shore Boom etc. Co.....	40 Wash. 315.....	567- 570
Nix v. State.....	74 S. W. (Tex. Cr. App.) 764	221
Noble v. Whitten.....	34 Wash. 507.....	399
North British R. Co. v. Park Yard Co.	App. Cas. (1898) 643....	366
North Chicago Elec. R. Co. v. Peu- ser	190 Ill. 67.....	77
Northern Pac. R. Co. v. Adams.....	192 U. S. 440.....	293
North River Boom Co. v. Smith....	15 Wash. 138.....	449
Noyes v. Pugin.....	2 Wash. 653.....	6
O'Connor v. Burnham.....	49 Wash. 443.....	563
Ogdensburg etc. R. Co. v. Pratt....	22 Wall. 123.....	688
Olson v. Snake River Valley R. Co..	22 Wash. 139.....	275, 512
Ottomeier v. Hornburg.....	50 Wash. 316.....	154
Owen v. St. Paul etc. R. Co.....	12 Wash. 313.....	448
Pacific Supply Co. v. Brand.....	7 Wash. 357.....	414, 415
Parsons v. State.....	81 Ala. 577.....	70, 71
Patillo v. State.....	22 Tex. App. 586.....	220, 221
Payne v. Terre Haute R. Co.....	157 Ind. 616.....	293
Peabody v. New York etc. R. Co....	187 Mass. 489.....	665
Pearson v. Alaska Pacific Steamship Co.	51 Wash. 560.....	426
Pease v. Baxter.....	12 Wash. 567.....	583
Peckham v. Davis.....	93 Ala. 474.....	630
Pennsylvania Co. v. Tacoma.....	36 Wash. 656.....	452
Pennsylvania R. Co. v. Jones.....	155 U. S. 333.....	688

			Page
Pennsylvania R. Co. v. Loftis.....	72	Ohio St. 288.....	688
People v. Colvin.....	118	Cal. 349.....	213
— v. Hanselman	76	Cal. 460.....	95
— v. Laird	102	Mich. 135.....	95
— v. Liphardt	105	Mich. 80.....	94
— v. Murphy	93	Mich. 41.....	95
— v. Powell	87	Cal. 348.....	214, 215
People ex rel. Ely v. Porter.....	50	Hun. 161.....	536
— Garling v. Van Allen... 55	N. Y.	31.....	536
— Skinnel v. Rand.....	41	Hun. 529.....	536
— Spahn v. Townsend.....	10	Abb. New Cas. 169.....	536
Peters v. Lewis.....	28	Wash. 366.....	553
Peterson v. Martin.....	28	N. C. 111.....	287
Peterson v. Seattle Traction Co....	23	Wash. 615.....	294, 296
Peterson v. Smith.....	6	Wash. 163.....	50, 51
Pewabic Min. Co. v. Mason.....	145	U. S. 349.....	60
Peyton v. Peyton.....	28	Wash. 278.....	312
Philadelphia etc. R. Co. v. Catawissa R. Co.	53	Pa. 20.....	145
Philadelphia etc. R. Co. v. Derby..	14	How. 468.....	465
Pioneer Fireproof Const. Co. v. Han- sen	176	Ill. 100.....	189
Pixley v. Huggins.....	15	Cal. 128.....	500
Polson v. Aberdeen.....	44	Wash. 155.....	328
Pool v. Chicago etc. R. Co.....	53	Wis. 657.....	466
Poole v. State.....	45	Tex. Cr. App. 348...	220, 221
Posay v. Scoville.....	10	Fed. 140.....	186
Poston v. Jones.....	122	N. C. 536.....	584
Powell v. Nolan.....	27	Wash. 318.....	277, 562
Price v. United States.....	165	U. S. 311.....	94
Prince v. Crocker.....	166	Mass. 347.....	202
Priscilla, The	106	Fed. 739.....	695
Puyallup v. Lakin.....	45	Wash. 368.....	446, 452
Pyatt v. Hegquist.....	45	Wash. 504.....	474
Rabel v. Seattle.....	44	Wash. 482.....	383
Railroad Co. v. Jones.....	95	U. S. 439.....	471
Railroad Co. v. Weaver.....	9	Lea 39.....	693
Ranney v. Melsenheimer.....	61	Mo. App. 434.....	507
Rathbun v. Thurston County.....	2	Wash. 564.....	583
Reed v. McGregor.....	62	Minn. 94.....	611
Remington v. Price.....	13	Wash. 76.....	589
Reynolds v. Crawfordsville First Nat. Bank	112	U. S. 405.....	249
Reynolds v. Reynolds.....	42	Wash. 107.....	439
Reynolds v. Toppan.....	16	Mass. 370.....	187
Ricks v. Baskett.....	68	Miss. 250.....	452
Ridgely v. Ridgely.....	79	Md. 298.....	47

CASES CITED.

xxiii

Page

Riley v. Charleston Union Station Co.	71 S. C.	457.....	202
Robins v. Paulson.....	30 Wash.	459.....	563
Robinson v. Davison.....	6 Exch.	269.....	173, 174
Roedler v. Chicago etc. R. Co.....	129 Wis.	270.....	532
Rogers v. Kennebec Steamboat Co..	86 Me.	261.....	293
Rose v. Des Moines Valley R. Co..	39 Iowa	346.....	293
Rose v. Owen.....	85 N. E. (Ind. App.)	129..	373
Rosen's Case.....	161 U. S.	42.....	94
Ross v. Adams.....	28 N. J. L.	160.....	450
Rothe v. Bellingrath.....	71 Ala.	55.....	277
Rowland v. Eskeland.....	40 Wash.	253.....	473
Rumford Falls Paper Co. v. Fidelity & Casualty Co.	92 Me.	574.....	128
Russell v. Robinson & Co.....	44 South. (Ala.)	1040.....	250
Russell v. Seattle, Renton etc. R. Co.	47 Wash.	500.....	296
Rust v. Kennedy.....	52 Wash.	472.....	699
Ryan v. Ferguson.....	3 Wash.	356.....	480, 483
Ryno v. Snyder.....	49 Wash.	421.....	514
Sadler v. Niesz.....	5 Wash.	182.....	480
Sage v. Central R. Co.....	93 U. S.	412.....	569
Sahlin v. Gregson.....	46 Wash.	452.....	439
Samish River Boom Co. v. Union Boom Co.	32 Wash.	586.....	447
Sargent v. Currier.....	49 N. H.	310.....	507
Saunders v. People.....	38 Mich.	218.....	92
Scarff v. Metcalf.....	107 N. Y.	211.....	187
Seanor v. Board of County Com'rs..	13 Wash.	48.....	51
Sears v. Stinson.....	3 Wash.	615.....	339, 340
Seattle v. Northern Pac. R. Co....	47 Wash.	552.....	268
Seattle v. Park.....	42 Wash.	151.....	228
Seattle v. Puget Sound Imp. Co....	47 Wash.	22.....	127, 132
Seattle v. Saulez.....	47 Wash.	365.....	266
Seattle & Montana R. Co. v. Corbett	22 Wash.	189.....	275
Seattle & Montana R. Co. v. Johnson	7 Wash.	97.....	398
Seattle & Montana R. Co. v. State.	7 Wash.	150.....	449
Seattle Nat. Bank v. Carter.....	13 Wash.	281.....	254
Seewald v. Harding Lumber Co....	49 Wash.	655.....	426, 429
Seixas v. Woods.....	2 Caines	48.....	625, 629
Shadwan, The	49 Fed.	379.....	186
Shattuck v. Green.....	104 Mass.	42.....	506
Shearer v. Buckley.....	31 Wash.	370.....	528
Shepard v. Vincent.....	38 Wash.	493.....	378
Shepherd v. Kain.....	5 B. & Ald.	240.....	628
Shoemake v. Finlayson.....	22 Wash.	12.....	114
Silliman v. United States.....	101 U. S.	465.....	374
Slisby v. Frost.....	3 Wash. Ter.	388.....	271

		<i>Page</i>
Singleton v. Carroll.....	6 J. J. Marsh. 527.....	173
Skinner v. Tacoma R. & Power Co..	46 Wash. 122.....	78
Slayton v. Felt.....	40 Wash. 1.....	589
Slyfield v. Willard.....	43 Wash. 179.....	583
Smalley v. Laugenour.....	30 Wash. 307.....	399
Smith v. Dorn.....	96 Cal. 73.....	641
Smith v. Michigan Lumber Co....	43 Wash. 402.....	387, 409, 426
Smith v. Seattle.....	33 Wash. 481.....	127
Smith v. Stevens.....	10 Wall. 321.....	147
Snohomish County v. Hayward....	11 Wash. 429.....	51
Snyder v. Hannibal etc. R. Co....	60 Mo. 413.....	470
Snyder v. Parker.....	19 Wash. 276.....	584
Soderberg v. King County.....	15 Wash. 194.....	684
South v. Maryland.....	18 How. 396.....	157
Southern Illinois & M. Bridge Co.		
v. Stone.....	174 Mo. 1.....	202
Spalding v. Rosa.....	71 N. Y. 40.....	173
Spencer v. Arlington.....	49 Wash. 121.....	405
Spencer v. Terrel.....	17 Wash. 514.....	287
Spokane v. Costello.....	33 Wash. 98.....	266
Spokane v. Costello.....	42 Wash. 182.....	266
Spokane v. Security Sav. Society...	46 Wash. 150.....	379
Stanley v. Stanley.....	32 Wash. 489.....	154
State v. Anderson.....	5 Wash. 350.....	318
— v. Anderson.....	30 Wash. 14.....	409
— v. Benson.....	28 Minn. 424.....	314
— v. Boston etc. R. Co.....	80 Me. 430.....	530
— v. Boyce.....	24 Wash. 514.....	407
— v. Brooks.....	4 Wash. 328.....	71
— v. Carnagy.....	106 Iowa 483.....	64
— v. Clark.....	34 Wash. 485.....	74
— v. Clark.....	134 N. C. 698.....	223
— v. Costello.....	29 Wash. 366.....	217
— v. Cushing.....	14 Wash. 527.....	215
— v. Cushing.....	17 Wash. 544.....	223
— v. Ellis.....	30 Wash. 369.....	216, 222
— v. Engle.....	156 Ind. 339.....	314
— v. Eubank.....	33 Wash. 293.....	318
— v. Fetterly.....	33 Wash. 599.....	134
— v. Griffin.....	43 Wash. 591.....	63
— v. Griftner.....	61 Ohio St. 201.....	451
— v. Hunter.....	18 Wash. 670.....	63
— v. Johanson.....	26 Wash. 668.....	112
— v. Johnson.....	19 Wash. 410.....	224
— v. Johnson.....	47 Wash. 227.....	223
— v. Jones.....	48 Wash. 133.....	63
— v. Kyle.....	14 Wash. 550.....	318
— v. Lattin.....	19 Wash. 57.....	214

CASES CITED.

xxv

		Page
State v. Lawson	40 Wash. 455.....	318
— v. Lewis	42 Wash. 672.....	91
— v. Lucas	94 Mo. App. 117.....	94
— v. Minton	116 Mo. 605.....	136
— v. Parsons	44 Wash. 299.....	66
— v. Pike	49 N. H. 399.....	70, 72
— v. Rogers	22 Ore. 348.....	36
— v. Ryan	34 Wash. 597.....	91
— v. Sexton	37 Wash. 110.....	95
— v. Smith	40 Wash. 615.....	91
— v. Sneff	22 Neb. 481.....	95
— v. Stockhammer	34 Wash. 262.....	223
— v. Van Waters	36 Wash. 358.....	407
— v. Wade	87 Md. 529.....	157
— v. Wood	33 Wash. 290.....	134
— v. Yardley	95 Tenn. 546.....	314, 317
State ex rel. Great Northern R. Co.		
v. Railroad Commission	47 Wash. 627.....	443
— Great Northern R. Co. v.		
Railroad Commission...	52 Wash. 33.....	23, 28
— Harlan v. Centralia etc. R.		
& P. Co.	42 Wash. 632.....	201, 203
— Harris v. Superior Court..	42 Wash. 660.....	201
— Jefferson County v. Hatch.	36 Wash. 164.....	14
— Jensen v. Bell.....	34 Wash. 185.....	460
— McCalley v. Superior Court	51 Wash. 572.....	314
— Martin v. Hinkle.....	47 Wash. 156.....	313
— Miller v. Lichtenberg.....	4 Wash. 407.....	553
— Miller v. Superior Court...	40 Wash. 555.....	313
— National Subway Co. v. St.		
Louis	145 Mo. 551.....	202
— Nolan v. District Court....	22 Mont. 25.....	489
— Oregon R. & Nav. Co. v.		
Railroad Commission ..	52 Wash. 17.....	35
— Orr v. Fawcett.....	17 Wash. 188.....	461
— Smith v. Board of Dental		
Examiners	31 Wash. 492.....	89
— Smith v. Superior Court...	26 Wash. 278.....	52
— Speckart v. Superior Court	48 Wash. 141.....	152
— Tacoma Ind. Co. v. White		
River Power Co.....	39 Wash. 648.....	201
— Thompson v. Prince.....	9 Wash. 107.....	684
— Trimble v. Superior Court..	31 Wash. 445.....	202, 449, 450
— Tyler v. Gobin.....	94 Fed. 48.....	157
— Young v. Superior Court...	43 Wash. 34.....	554
Steel v. Lester & Lilee.....	3 C. P. D. 121.....	188
Steele v. Northern Pac. R. Co....	21 Wash. 287.....	528

Stephens v. Pennsylvania Casualty Co.	135 Mich.	189.....	131
Sterling's Appeal	111 Pa. St.	35.....	368
Stone v. Southern Illinois & M. Bridge Co.	206 U. S.	267.....	202
Strandell v. Moran.....	49 Wash.	533.....	154
Strong v. Campbell.....	11 Barb.	135.....	157
Suell v. Jones.....	49 Wash.	582.....	154
Sullivan v. Sullivan.....	49 Wash.	508.....	165
Sullivan v. Wood & Co.....	43 Wash.	259.....	410
Sunter v. Sunter.....	190 Mass.	449.....	665
Sutton & Co. v. Coast Trading Co...	49 Wash.	694.....	510
Swett v. Colgate.....	20 Johns.	196.....	625, 629
Tacoma v. State.....	4 Wash.	64.....	447
Tacoma v. Tacoma Light & Water Co.	17 Wash.	458.....	109, 119
Taggard v. Loring.....	16 Mass.	336.....	187
Taylor v. Ballard.....	24 Wash.	191.....	407
Taylor v. Modern Woodmen of America	42 Wash.	304.....	395
Tennessee v. Hill.....	60 Fed.	1005.....	153
Tergeson v. Robinson Mfg. Co.....	48 Wash.	294.....	668, 671
Terry v. State.....	45 Tex. Cr. App.	264...220, 221	
Thomas v. Osborn.....	19 How.	22.....	187
Thompson v. Etowah Iron Co.....	91 Ga.	538.....	501
Thompson v. Germania Fire Ins. Co.	45 Wash.	482.....	558
Thomson v. Issaquah Shingle Co...	43 Wash.	253.....	406
Thorp v. Hammond.....	12 Wall.	408.....	186, 187
Tillery v. State.....	24 Tex. App.	251.....	222
Tills v. Great Northern R. Co.....	50 Wash.	536.....	189
Todd v. Union Dime Sav. Inst.....	128 N. Y.	636.....	501
Town of Como v. Pointer.....	87 Miss.	712.....	592
Travelers Ins. Co. v. Henderson Cotton Mills	120 Ky.	218.....	131
Travelers' Ins. Co. v. Moses.....	63 N. J. Eq.	260.....	132
Traver v. Spokane St. R. Co.....	25 Wash.	225.....77, 528,	532
Tremmel v. Mess.....	46 Wash.	137.....	56
Turner v. Iowa Nat. Bank.....	2 Wash.	192.....	321
Turner v. Turner.....	33 Wash.	118.....	305, 312
Tye v. Fynmore.....	3 Camp.	462.....	627
Tyler v. Tyler.....	19 Ill.	151.....	543, 544
United States v. Dunnington.....	146 U. S.	338.....	450
United States v. Freeman.....	3 How.	556-564.....	145
United States v. Moore.....	161 Fed.	513.....	144
United States v. Tynen.....	11 Wall.	88.....	36
United States v. Walsh.....	1 Deady	281.....	316
United States v. Walsh.....	1 Abb.	66.....	316

CASES CITED.

xxvii

		Page
Van de Vanter v. Flaherty.....	37 Wash. 218.....	364, 368
Van Ohlen v. Van Ohlen.....	56 Ill. 528.....	367
Viele v. Germania Ins. Co.....	26 Iowa 9.....	559
Vietor v. Glover.....	17 Wash. 37.....	321
Vose v. Cockroft.....	45 Barb. 58.....	188
Vowell v. Issaquah Coal Co.....	31 Wash. 103.....	410
Vrooman v. Li Po Tai.....	113 Cal. 302.....	16
Walker v. Hall.....	34 Pa. St. 483.....	543
Ward v. Dewey.....	16 N. Y. 519.....	500
Ward v. Hinkleman.....	37 Wash. 375.....	608
Warden v. Blakley.....	32 Wis. 690.....	328
Warwick v. Hitchings.....	50 Wash. 140.....	154, 294
Wasatch Min. Co. v. Jennings.....	5 Utah 243.....	584
Washington Rock Plaster Co. v. Johnson	10 Wash. 445.....	589
Washington Timber & Loan Co. v. Smith	34 Wash. 625.....	473
Waterbury v. New York etc. R. Co..	17 Fed. 671.....	465
Watson v. New York Cent. R. Co..	47 N. Y. 157.....	450
Webster v. Disharoon.....	64 Fed. 143.....	186
Weinberg v. Naher.....	51 Wash. 591.....	578
Wells v. Erstein.....	24 La. Ann. 317.....	287
Westby v. Washington Brick etc. Mfg. Co.	40 Wash. 289.....	666
Wheeler v. Buck & Co.....	23 Wash. 679.....	295
Whitaker v. McCormick.....	6 Mo. App. 114.....	631
White v. Krutz.....	37 Wash. 34.....	577
White v. Miller.....	71 N. Y. 118.....	629
White v. Territory.....	1 Wash. 379.....	410
White Crest Canning Co. v. Sims...	30 Wash. 374.....	583
Whitmore v. Orono Pulp & Paper Co.	91 Maine 297.....	608
Wickham v. Sprague.....	18 Wash. 466.....	312
Wilcox v. Smith.....	38 Wash. 585.....	593, 594
Wilcox v. Watson.....	49 Wash. 215.....	154
Williams v. Pittock.....	35 Wash. 271.....	286, 287
Williams v. Spokane Falls & N. R. Co.	39 Wash. 77.....	296
Wilson v. Puget Sound Elec. Co....	50 Wash. 596.....	399
Windmiller v. Northern Pac. R. Co.	52 Wash. 613.....	695
Windt v. Banniza.....	2 Wash. 147.....	395
Woelflen v. Lewiston-Clarkston Co.	49 Wash. 405.....	399
Wolcott Johnson & Co. v. Mount...	36 N. J. L. 262.....	630
Wolf v. Pennsylvania R. Co.....	195 Pa. St. 91.....	643
Wood v. Baker.....	88 N. Y. S. 854.....	48
Woodbury v. Swan.....	59 N. H. 22.....	378
Wurster v. Seattle.....	51 Wash. 654.....	5, 8

	<i>Page</i>
Yakima Valley Bank v. McAllister 37 Wash. 566.....	407
Yakima Water L. & P. Co. v. Hath-	
away	18 Wash. 377..... 450
Yesler Estate v. Holmes.....	39 Wash. 34.....114, 634, 635
Zeimantz v. Blake.....	39 Wash. 6..... 578

STATUTES

CITED AND CONSTRUED

CONSTITUTION OF WASHINGTON.		BALLINGER'S CODE—Continued.	
	<i>Page</i>		<i>Page</i>
Art. 1 § 12	314	Section 6812	490
“ 1 § 16	50	“ 7105	318
“ 1 § 17	314, 316		
“ 7 § 2	452		
“ 12 § 18	35		
BALLINGER'S CODE.		PIERCE'S CODE.	
Section 1269	344	Section 257	301
“ 3030	95	“ 342	14
“ 3738	399	“ 593	231
“ 4477	47	“ 618	136
“ 4482, 4483	45	“ 671	183
“ 4488, 4489, 4580.	3	“ 1033	39
“ 4598 541, 543, 547		“ 1093	176
“ 4829	301	“ 1103	164
“ 4886	14	“ 1144, 1145	520
“ 4979	231	“ 1156	344
“ 5004	136	“ 1160 55, 56	56
“ 5054	183	“ 1161	56
“ 5153	39	“ 1228	58
“ 5165	164	“ 1434-1443	640
“ 5503 55, 56		“ 1607	318
“ 5504	56	“ 2053	490
“ 5508, 5509	520	“ 2344 541, 543, 547	
“ 5521	344	“ 2410, 2411, 2417, 2433	151
“ 5583	58	“ 2531	176
“ 5637	448	“ 3563	344
“ 5643	52	“ 3864, 3867, 3875.	3
“ 5679	515	“ 4476	95
“ 5780-5789	640	“ 4553	399
“ 5900	562	“ 5102	448
“ 5904	512	“ 5108	53
“ 5908	511	“ 6102	562
“ 5909	562	“ 6106	512
“ 5917 278, 512, 562		“ 6110	511
“ 6120, 6121, 6125, 6141	151	“ 6111	562
“ 6226	176	“ 6119 278, 512, 562	
“ 6500, subd. 3, 6.	552	“ 6262	47
		“ 6275, 6276	45
		“ 8734	515

SESSION LAWS.		SESSION LAWS— <i>Continued.</i>	
	<i>Page</i>		<i>Page</i>
1857-8, p. 52.....	247, 251	1905, p. 84.....	228
1867, p. 45.....	247	p. 87	230
1869, p. 318.....	378	p. 267	381, 384
1885-6, p. 165.....	378	p. 363	399
1893, pp. 3, 210.....	35	1907, p. 33, §§ 6, 10.....	73
p. 189, ch. 84, § 4.....	446-448	p. 123, §§ 1-3.....	381-384
p. 189, §§ 13, 17.....	450	p. 288, ch. 145.....	510
p. 301	51	p. 349, § 1	203, 205
1895, p. 82.....	51	p. 396	61, 64, 135
p. 271	396	p. 536, ch. 226....	24, 27, 32, 35
1897, p. 113.....	35	p. 536, § 21	25
1899, p. 86, § 3.....	59	p. 538, § 3	24
p. 88, § 6, subd. 2.....	59	p. 544, § 4	30
1903, p. 209.....	533	p. 548, § 5	29
p. 244, ch. 131.....	313		
p. 244, §§ 1, 2.....	314, 317	CHARTER.	
		Walla Walla, § 4.....	454

ERRATA

Page 444, 4th syllabus, line 2, for 1903 read 1893

Page 448, line 3 from top, for 1873 read 1893

ERRORS NOTED IN PREVIOUS VOLUMES

VOLUME 50

Page 518, line 7 from top, for art. 11 read art. 2

Page 520, last line, for art. 11 read art. 2

VOLUME 51

Page III, for William P. Bell read Walter P. Bell

Page 474, line 15 from bottom, for § 4816a (P. C. § 300) read
§ 4886a (P. C. § 362)

THE SUPREME COURT.

LAWS OF WASHINGTON, 1909, CH. 24, P. 33.

AN ACT increasing the number of judges of the Supreme Court of the State of Washington, providing for the court *en banc* and for separate departments of such court, for the holding of terms thereof, for the method of hearing and determining causes therein, authorizing the making of rules; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. The Supreme Court, from and after the taking effect of this act, shall consist of nine judges.

SEC. 2. Upon the taking effect of this act, the Governor shall appoint the two additional judges herein provided for, who shall hold office until the second Monday in January, 1911. At the next succeeding general election after the passage of this act there shall also be elected two judges, in addition to those provided by existing law, to hold office for the full term of six years commencing with the second Monday in January, 1911, and likewise every six years thereafter two judges shall be elected, in addition to those provided for by existing law.

SEC. 3. There shall be two departments of the Supreme Court, denominated respectively Department One and Department Two. The Chief Justice shall assign four of the associate judges to each department and such assignment may be changed by him from time to time: *Provided*, That the associate judges shall be competent to sit in either department and may interchange with one another by agreement among themselves, or if no such agreement be made, as ordered by the Chief Justice. The Chief Justice may sit in either department and shall preside when so sitting, but the judges assigned to each department shall select one of their number as presiding judge. Each of the departments shall have the power to hear and determine causes, and all questions arising therein, subject to the provisions in relation to the court *en banc*. The presence of three judges shall be

necessary to transact any business in either of the departments, except such as may be done at chambers, but one or more of the judges may from time to time adjourn to the same effect as if all were present, and a concurrence of three judges shall be necessary to pronounce a decision in each department: *Provided*, That if three do not concur, the cause shall be reheard in the same department or transmitted to the other department, or to the court *en banc*.

SEC. 4. The Chief Justice shall from time to time apportion the business to the departments, and may, in his discretion, before a decision is pronounced, order any cause pending before the court to be heard and determined by the court *en banc*. When a cause has been allotted to one of the departments and a decision pronounced therein, the Chief Justice, together with any two associate judges, may order such cause to be heard and decided by the court *en banc*. Any four judges may, either before or after decision by a department, order a cause to be heard *en banc*. The decision of a department, except in cases otherwise ordered as hereinafter provided, shall not become final until thirty days after the filing thereof, during which period a petition for rehearing, or for a hearing *en banc*, may be filed, the filing of either of which, except as hereinafter otherwise provided, shall have the effect of suspending such decision until the same shall have been disposed of. If no such petition be filed the decision of a department shall become final thirty days from the date of its filing, unless during such thirty-day period an order for a hearing *en banc* shall have been made: *Provided*, That if for any cause the Chief Justice or a majority of the department rendering any decision shall be of the opinion that such decision should go into effect prior to thirty days after its filing, it shall go into effect, and a judgment issue thereon, any time after its filing and prior to such thirty-day period, upon being in writing approved by the Chief Justice and any two associate judges who took no part in rendering such decision. The effect of granting a petition for a rehearing, or of ordering a cause once decided by de-

partment to be heard *en banc*, shall be to vacate and set aside the decision. Whenever a decision shall become final, as herein provided, a judgment shall issue thereon.

SEC. 5. The Chief Justice, or any four judges, may convene the court *en banc* at any time, and the Chief Justice shall be the presiding judge of the court when so convened. The presence of five judges shall be necessary to transact any business, and a concurrence of five judges present at the argument shall be necessary to pronounce a decision in the court *en banc*: *Provided*, That if five of the judges so present do not concur in a decision, then reargument shall be ordered and all the judges qualified to sit in the cause shall hear the argument, but to render a decision a concurrence of five judges shall be necessary; and every decision of the court *en banc* shall be final except in cases in which no previous decision has been rendered in one of the departments, and in such cases the decision of the court *en banc* shall become final thirty days after its filing, unless during such period a petition for rehearing be filed. The filing of such petition within such period shall have the effect of suspending the decision until disposed of by the concurrence of five judges: *Provided*, That if for any cause five judges shall be of the opinion that such decision should go into effect prior to thirty days after its filing, it shall go into effect any time after its filing and prior to such thirty-day period upon being in writing approved by six judges of such court. Whenever a decision shall become final as herein provided, a judgment shall issue thereon.

SEC. 6. In cases of the absence of the Chief Justice, or his inability to act, the judge having the shortest term to serve, not holding his office by appointment or election to fill a vacancy, shall perform the duties and exercise the powers of the Chief Justice during such absence or inability to act. In case there shall be two or more judges having in like manner the same short term, the other judges of the Supreme Court shall determine which of them shall perform the duties

and exercise the powers of the Chief Justice during such absence or inability to act.

SEC. 7. The Supreme Court shall always be open for the transaction of business except on non-judicial days. It shall hold regular sessions for the hearing of causes *en banc*, and in each of its departments, at the capital of the state at the respective times now provided by law for holding terms of the Supreme Court. Special sessions at the same place may be held at such other times as may be prescribed by the judges of such court.

SEC. 8. The Supreme Court may from time to time institute such rules of practice and prescribe such forms of process to be used in such court and in the court *en banc* and each of its departments, and for the keeping of the dockets, records and proceedings, and for the regulation of such court, including the court *en banc* and in departments, as may be deemed most conducive to the due administration of justice.

SEC. 9. Until the organization of the court into separate departments shall have been consummated, and the transaction of business commenced in one or both of such departments, all causes and matters theretofore submitted to the court shall be disposed of by the court independent of the provisions of this act pertaining to such court *en banc* and in departments.

SEC. 10. An emergency is declared to exist, and this act shall take effect immediately.

Passed by the Senate February 10, 1909.

Passed by the House February 24, 1909.

Approved February 26, 1909.

CASES
DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON

[No. 7740. Decided February 26, 1909.]

MABEL CORBETT, *Respondent*, v. MATTHEW SLOAN,
Appellant.¹

HUSBAND AND WIFE—COMMUNITY PROPERTY—GIFTS—FRAUDULENT CONVEYANCE—EVIDENCE—SUFFICIENCY. It sufficiently appears, within the rule casting the burden of proof upon the wife in case of a gift from the husband, that real property standing in the name of the wife was her separate property, where there was nothing to impeach the testimony of the parties that the money with which it was purchased was secured by the husband for personal injuries sustained, and given by him to his wife, and the deed taken in her name, upon legal advice, in order to effect a gift thereof to her, in the absence of creditors of the husband at the time the gift was made, although the husband paid taxes for two years and some interest, and the wife's deed was not at once recorded.

Appeal from a judgment of the superior court for King county, Morris, J., entered April 2, 1908, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action to quiet title. Affirmed.

Murphine & Collins and *W. V. Tanner*, for appellant.

Reynolds, Ballinger & Hutson, for respondent.

GOSE, J.—This action was commenced by the respondent against the appellant and the defendant, to quiet title to certain real property, situated in the city of Seattle. From a

¹Reported in 99 Pac. 1025.

decree quieting title in the respondent, this appeal is prosecuted.

The appellant relies upon two questions for a reversal: (1) The admission in evidence of a privileged communication; (2) insufficiency of the evidence to support the decree. The view we take of the evidence, aside from that claimed to be privileged, renders it unnecessary to consider the first question.

The respondent and the defendant were husband and wife at the time the property was purchased, and at the time of the trial. On March 10, 1905, the property was purchased, for a consideration of \$1,600, and the deed of conveyance was taken in the name of the respondent. At the time of the conveyance, all of the purchase price had been paid, save a small mortgage, which had not been paid at the time of the trial. At the time of the purchase, the respondent and her husband took possession of the property, and the respondent lived on the same for about three years, after which she rented it and collected and retained the rental. In the month of April, 1907, the appellant recovered a judgment against the husband, and on the 8th day of June, 1907, had the property sold under an execution issued upon such judgment. The appellant was the purchaser at such sale and received, and in due time filed for record, the sheriff's certificate of sale. The purpose of this action is to remove the cloud cast upon the title by the filing of such certificate.

The single question presented is whether the property at the time of the rendition of the judgment was the separate property of the respondent, or the community property of the respondent and her husband. The defendant was called as a witness on behalf of the respondent, and testified that, shortly before the purchase of the property, he had recovered a judgment in a personal injury suit, waged in his behalf, and had collected thereon the sum of \$3,680; that, upon receiving the money, he took it home, threw it into his wife's lap, and gave it to her; that he and the respondent then went to the bank, and at her suggestion he deposited the money in his name; that

Feb. 1909]

Opinion Per GOSZ, J.

he had the deed drawn in favor of the respondent for the purpose of making it her private property; that upon the delivery of the deed to him he gave it to her and told her it was her property; that it was not his intention to have any community interest in the same; that he paid for the property in excess of the mortgage from the money he had given the respondent; that he had theretofore taken legal advice as to the method to be pursued to vest the title in respondent. The respondent testified that her husband brought the judgment money home and gave it to her; that he also gave her the deed and told her that it was her property; that she put the deed away and kept it. Mrs. Chapman, a sister of the respondent, gave evidence to the effect that, shortly after the purchase, the husband told her that he had given the respondent the money with which to buy the property, and that he had no interest in it. Mrs. Lilligren, one of the grantors, testified that, a few days before the deed was executed, the respondent stated to her that the property when purchased was to be her property, and that the husband thereupon remarked, "All right."

To overcome these facts, it was shown that the deed was not recorded until September 13, 1907, that the husband paid the taxes, and that he paid two installments of interest on the mortgage. Such facts do not impeach the integrity of the original transaction. In the absence of evidence that the appellant was a creditor when the property was purchased, it was competent for the husband to make a gift of the property to the respondent. The respondent's title depends entirely on the intention of the parties, and their good faith at the time of the transaction. Property acquired by either spouse after marriage, by gift, is the separate property of the spouse acquiring the same. Bal. Code, §§ 4488, 4489 (P. C. §§ 3875, 3867). The burden of proof is on the respondent to show the *bona fides* of the transaction. Bal. Code, § 4580 (P. C. § 3864).

The evidence herein discussed convinces us that the prop-

erty in controversy is the separate property of the respondent, and the decree is therefore affirmed.

RUDKIN, C. J., CHADWICK, FULLERTON, MOUNT, DUNBAR, and CROW, JJ., concur.

[No. 7818. Decided February 26, 1909.]

EUGENE SCHERRER, *Respondent*, v. THE CITY OF SEATTLE, *Appellant*.¹

MUNICIPAL CORPORATIONS—ACTIONS—CLAIMS—AS CONDITION PRECEDENT—REASONABLENESS OF REQUIREMENTS—STATEMENT OF CLAIMANT'S RESIDENCE. It is an unreasonable requirement that a claimant for damages against a city shall state his residence for one year last past, in a claim to be filed with the city, as a condition precedent to action against the city, and hence one that the city has no power to enforce by ordinance (CHADWICK and FULLERTON, JJ., dissenting).

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. It is harmless error to instruct upon a question not involved in the case, where it was merely casual and leading up to the other instructions, and it plainly appears to have been without prejudice.

SAME. Failure to limit the amount of recovery to the amount claimed is harmless where it appears from the instruction as a whole that the jury could not have been misled, and the verdict was less than the amount claimed.

TRIAL—INSTRUCTIONS—TESTIMONY AND EVIDENCE. It is not a valid objection to instructions that the word "testimony" was used in place of the word "evidence."

APPEAL—REVIEW—EXCEPTIONS TO INSTRUCTIONS. Error cannot be predicated on the refusal to give instructions, request for which was laid on the judge's table and not called to his attention until the jury retired, when the court offered to recall the jury to give the instructions, and counsel did not avail himself of the offer, merely contenting himself with stating an exception.

DAMAGES — PERSONAL INJURIES — EXCESSIVE VERDICT. A verdict will not be set aside as excessive when, if excessive at all, it was not so excessive as to be the result of passion or prejudice.

Appeal from a judgment of the superior court for King county, Albertson, J., entered June 8, 1908, upon a verdict

¹Reported in 100 Pac. 144.

Feb. 1909]

Opinion Per DUNBAR, J.

rendered in favor of the plaintiff, in an action for personal injuries sustained through a defective sidewalk. Affirmed.

Scott Calhoun and James E. Bradford, for appellant.

Reynolds, Ballinger & Hutson, for respondent.

DUNBAR, J.—This action was brought by plaintiff, to recover damages for personal injuries, alleged to have been caused by the negligence of defendant in maintaining a sidewalk, and a verdict was returned in favor of plaintiff in the sum of \$963. Motion for new trial was denied, judgment entered, and appeal followed.

The first two assignments of error are to the effect that the court erred in admitting in evidence the claim filed with the city, and erred in denying appellant's motion challenging the legal sufficiency of the evidence. These assignments seem to be directed to an alleged defect in the claim of damages filed, in that the claim did not state the residence of the claimant, for one year last past. This question was determined adversely to appellant's contention in the case of *Hase v. Seattle*, 51 Wash. 174, 98 Pac. 370, where it was held that the requirement under discussion was an unreasonable one; and this decision was affirmed in the case of *Wurster v. Seattle*, 51 Wash. 654, 100 Pac. 143. So that it will not be necessary to discuss that proposition again.

It is assigned that the court erred in its instruction in regard to the duty of the city in constructing its sidewalks, inasmuch as that question was not involved in the case and there was no testimony on that subject. A reference to the original construction of the sidewalk appearing in the instructions given by the court was merely casual, and leading up to the instruction in regard to the duty of the city in maintaining such a walk. It is true that, as a general rule, instructions should not be given concerning immaterial issues; but it plainly appears from all the instructions, and from the testimony, that the instruction was entirely without prejudice. No theory could be advanced upon which the appel-

lant could found a prejudice, because the jury could not possibly have been misled by this prefatory remark of the court concerning the real matter at issue, viz., the negligence of the city in maintaining a dangerous sidewalk.

It is insisted by the appellant that the court erred when it instructed the jury that their verdict should be for the plaintiff in such sum as would fairly compensate him for the loss, in that the court ought to have limited the instruction to the amount claimed in the complaint. We think from the whole instruction that the jury were not misled in this particular, not only from the language of the instructions as a whole, but from the fact that the amount of damages found by the jury was less than the amount claimed.

Counsel for appellant also insists that the court erred in using indiscriminately the words "testimony" and "evidence," in his instructions to the jury, and sets forth the technical differences between the words. This same objection was raised in the case of *Jones v. Seattle*, 51 Wash. 245, 98 Pac. 743, and was disposed of in the following language:

"Counsel for appellant criticises the instructions of the court for the reason that the word 'testimony' was used where it is alleged the word 'evidence' should have been used. But this criticism we think is overtechnical. While it is true that some authorities define the words as technically different, making 'evidence' the more comprehensive word, yet in common expression, even of courts, they are used synonymously, and we have no idea that the jury was misled by any accurate knowledge on its part or nice technical distinctions. This same question was considered by this court in *Noyes v. Pugin*, 2 Wash. 653, 27 Pac. 548, and the contention now urged by appellant was held to be without merit."

In this case there was really only one question for the jury to consider, and that was the contributory negligence of the appellant; for the negligence of the city in maintaining the sidewalk in the condition in which it was maintained was proven without any question, and without any contradiction on the part of the city, the city having introduced no

Feb. 1909]

Opinion Per DUNBAR, J.

evidence upon that point. No matter what instruction the court might have given, the jury could not have found that the city was not guilty of negligence.

The appellant alleges error of the court in refusing to give a great number of instructions which appear in the record. In addition to the fact that these instructions, so far as they stated the law, had already been given by the court, the record shows that they really never were submitted to the court for a presentation to the jury. After the jury had retired the following occurred:

"Mr. Bradford: The defendant duly and timely excepts, etc. The Court: I wasn't aware that the defendant requested any instructions. They were not exhibited to me. If they were, I wasn't aware of it. Mr. Bradford: I filed them with the clerk before the argument began. The clerk says they were laid on your desk. The Court: Perhaps I thought they were the pleadings. If there is anything you will call my attention to I will recall the jury. (Looking over instructions.) I did not instruct the jury on the subject of comparative negligence. If you think that is important I will recall the jury. Mr. Bradford: Of course, I want to take exception to the court refusing to give all of them. The Court: I wasn't aware that you requested them given. If you think that is important enough I will recall them. I don't think it is necessary, unless considered of sufficient importance by counsel. Mr. Bradford: Except to the refusal of the court to give defendant's requested instruction No. 1, which requested instruction is as follows, to wit:" etc.

It is evident from the record that counsel was more anxious to obtain an exception to the court's refusal to give instructions than he was to have the instructions given, and that they were not actually submitted to the court for the purpose of being given to the jury. It is well said by counsel for respondent that the object of presenting proposed instructions to the court is, not to place some matter in the record without the court's knowledge from which error can be claimed, but rather to call the court's attention to specific instructions desired, to the end that a just result may be ob-

tained in the trial. In this case, when the court's attention was called to the fact that he had not given the instructions presented by the appellant, he offered to recall the jury and give the instructions if thought necessary by appellant's counsel, and counsel did not indicate that he thought it was necessary. We have examined the instructions of the court as a whole, and they appear to be singularly free from error, plain, fair, and explicit.

It is also contended that the verdict is excessive. The verdict rendered was for \$963. From the testimony in the case we are not able to say that the verdict, if excessive at all, is so excessive that it is the result of passion and prejudice.

The judgment will be affirmed.

RUDKIN, C. J., CROW, and GOSE, JJ., concur.

CHADWICK, J. (dissenting).—For the reasons assigned in the dissenting opinion in the case of *Wurster v. Seattle*, 51 Wash. 654, 100 Pac. 143, I am unable to concur in that part of the foregoing opinion which overrules the first assignment of error. I concur in the conclusions reached by the majority on all other propositions discussed by Judge Dunbar.

FULLERTON, J., concurs with CHADWICK, J.

[No. 7662. Decided February 27, 1909.]

WILLIAM HOGG, *Appellant*, v. STANDARD LUMBER COMPANY,
Respondent.¹

MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE OF MASTER—METHODS OF WORK—LOADING LOGS—EVIDENCE—SUFFICIENCY. There is not sufficient evidence of negligence in loading logs on a sled to entitle a teamster to recover for injuries sustained by reason of the slipping and falling of logs from the load, and a nonsuit is properly granted, where it appears that the fall was due to the fact that the front bob of the sled broke through the ice into a rut, causing the load to lurch and sway, that the logs were loaded and secured in the usual manner employed in that and other camps, that all such loads were more or less unsafe and that the teamster, a man of experience, had opportunity to observe the manner in

¹Reported in 100 Pac. 151.

Feb. 1909]

Opinion Per CROW, J.

which the load was secured, but failed to do so; and there is no presumption of negligence from the fact that an accident happened in such a case.

EVIDENCE—OPINIONS OF EXPERTS—QUESTION FOR JURY. The opinion of experts is inadmissible to show that the method of loading logs on a sled was not proper and safe, that being an issue for the jury to determine from full details as to how the logs were loaded and the usual manner of loading in that and other camps in the same locality.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered June 30, 1908, in favor of the defendant by direction of the court, after a trial on the merits before a jury, in an action for injuries sustained by a teamster. Affirmed.

S. P. Domer and Harris Baldwin, for appellant.

Danson & Williams, for respondent.

CROW, J.—Action by William Hogg against the Standard Lumber Company, a corporation, to recover damages for personal injuries. One Hiram Hogg, father of the plaintiff, entered into a contract with the Standard Lumber Company to haul logs from certain timber land in Spokane county to defendant's sawmill, and in the performance of such contract employed the plaintiff, William Hogg, to drive one of the teams. The logs were loaded upon sleds by employees of the defendant. The plaintiff, by direction of the defendant's foreman, hitched his team to a loaded sled and started for the mill, about three miles distant. He alleged, that the logs were not properly loaded and secured so as to prevent them from slipping or falling; that the defendant knew of such defective loading; that, while he was riding on the load and driving his team, some of the logs slipped and fell, throwing him to the ground causing his injuries; that his only duty was to drive the team, and that the accident was caused by the defendant's negligence in loading the logs. On a jury trial, the plaintiff having rested, the defendant challenged the sufficiency of his evidence, and moved the court to withdraw the case from the jury. This motion being granted, final judgment was en-

tered in favor of the defendant. The plaintiff has appealed.

The appellant, by his first assignment of error, contends that the respondent's challenge to the sufficiency of the evidence should have been denied. The trial court, in sustaining the challenge, held (1) that the appellant had failed to produce evidence sufficient to show any negligence on the part of the respondent, and (2) that appellant had voluntarily assumed the risk of the dangers of the employment in which he was engaged. After a careful examination of the evidence, we conclude that these holdings should both be sustained, although we will only discuss the issue of respondent's alleged negligence.

Appellant at the date of the accident lacked but a few days of his majority. The undisputed evidence shows that he was a man in size, weight, strength, and experience; that he had cut logs, hauled logs, and worked in sawmills and lumber camps for the period of four years; that he had loaded logs and driven teams; that these logs were loaded upon sleds at a lumber camp by respondent's employees; that the appellant had ample opportunity to see and observe the manner in which the particular load causing his injury had been secured upon the sled; that in driving to the mill the front runner of his sled broke through some ice, and fell into a deep rut or hole; that the load was thereby caused to sway, and that some logs slipped off the sled, striking appellant. He testified that he did not examine or look at the load of logs to ascertain its condition, before hitching his team to the sled. He assumed that it was properly secured. One Inman, who asked permission to ride with him, testified that appellant stopped his horses and, in substance, said that he (Inman) might climb on if he was not afraid, but that he (appellant) was a little bit afraid. One Alford, appellant's witness, in response to questions propounded by his own counsel, testified as follows:

"Q. Would you consider a load of the size of that, that the plaintiff was hauling, loaded in the manner that you

Feb. 1909]

Opinion Per CROW, J.

have illustrated here, to be loaded safely for hauling over the road that that load was to be hauled over? A. You mean that load? Q. Yes. Considering the condition of the logs, the ice and the snow that was on them. A. Well, they were as safe as any logs, load of logs, but didn't consider any of them safe. Q. Don't consider any load safe? A. No load safe. Q. You would consider what? A. I wouldn't consider any load of logs safe. Q. Loaded as this was loaded? A. As any of them were loaded. Q. Why? A. Well, because they aren't safe. Q. Why? A. Well, chain liable to break any time on any load with a big load of logs. Q. Because there were not enough chains on them, is that the reason they were not safe? A. I don't know that is the reason. Probably some of the chains would break, sometimes have one roll off; sometimes the corner binds come off; sometimes the corner binds break."

Mr. Inman, who, as above stated, was riding with the appellant at the time of the accident, further testified as follows:

"Q. How did the logs happen to fall off the load—you say it gave? A. It broke through the ice in the wagon rut, and the front bob of the sled broke through, and it gave a kind of shake, and when the hind bob came along dropped in the same hole, why the load when it dropped off, the load dropped down it gave, and the logs rolled off. . . . Q. How fast was the team going; that is, was it walking or trotting? A. Well, it was in a trot, I think, to the best of my knowledge. Q. Now, did you notice how far the bob dropped into the ground at the rut, how deep it was? A. Six or eight inches, I imagine, something like that. Q. You say that caused the load to sway or swing. A. When it broke through, you know; it's natural when it would break through to drop, that would give it a kind of lurch, kind of twist, and when the front bob dropped through it gave a kind of twist that way, and when the hind one came along give it the same motion; then it gave way. Q. Now, then, as I understand you, when the hind bob struck into the rut it caused the logs to be thrown off? A. Yes."

Other witnesses testified that the logs were loaded and secured in the manner usually employed in that and other

lumber camps. Appellant has failed to direct our attention to any evidence showing any specific negligence in loading the logs, or the particular defect in loading on which he relies. His sole contention seems to be that negligence is shown by the happening of the accident. In his opening brief, stating the substance of his argument, he says: "The mere fact that the appellant was injured, under the circumstances in which he was injured, is *prima facie* evidence of negligence in the respondent." Considering the relations of the parties, the character of the employment in which the appellant was engaged, and all the circumstances as disclosed by the evidence, no such doctrine can be here applied. The mere fact that the appellant was injured does not of itself warrant a finding of negligence on the part of respondent.

Appellant further contends that the trial court erred in excluding certain testimony of expert witnesses, tendered by him. His witnesses were permitted to testify fully as to the manner in which the particular logs were actually loaded and secured upon the sled, and also as to the usual manner of loading them employed in respondent's lumber camp and other camps in the same locality. But witnesses whom he offered as experts were not permitted to testify that in their opinion the particular manner in which these logs were loaded was or was not proper and reasonably safe, that being regarded by the trial court as an issue to be determined by the jury in the event of evidence sufficient to show negligence being offered for their consideration. We find no prejudicial error in the ruling.

The judgment is affirmed.

RUDKIN, C. J., DUNBAR, FULLERTON, and MOUNT, JJ.,
concur.

CHADWICK and GOSE, JJ., took no part.

Feb. 1909]

Opinion Per GOSE, J.

[No. 7879. Decided February 27, 1909.]

THE STATE OF WASHINGTON, *on the Relation of Joshua
Trickel, Plaintiff*, v. THE SUPERIOR COURT FOR
CLALLAM COUNTY, *Respondent*.¹

MANDAMUS—PLEADING—ANSWER. Upon application for a writ of mandamus, the defendant may both demur and answer.

APPEARANCE—WHAT CONSTITUTES—FILING DEMAND FOR INTERROGATORIES. The service by defendant of interrogatories, within twenty days, constitutes an appearance, under a liberal construction of Bal. Code, § 4886, providing that a defendant appears when he answers, demurs, or makes any application for an order, or gives plaintiff written notice of appearance.

Application filed in the supreme court, January 25, 1909, for a writ of mandamus to compel the superior court for Clallam county, Still, J., to enter a judgment of default. Denied.

A. A. Richardson, for relator.

William B. Ritchie, for respondent.

GOSE, J.—On December 12, 1908, an action was commenced in the superior court of Clallam county, wherein the relator was the plaintiff and one James Gallagher was the defendant, for the recovery of a judgment on a tort. Due service was made on the defendant on said day, and on December 31 he caused certain interrogatories, regularly entitled in the cause, to be served on the relator, which were filed January 4, 1909. In the forenoon of the last-named day, the relator filed a motion for a default judgment, and forwarded the same by mail, together with the affidavit of his attorney, and the files in the cause, to the respondent in Island county, his district comprising the counties of Island, Jefferson, and Clallam. In the afternoon of the same day, the defendant, by his counsel, served and filed a demurrer to the

¹Reported in 100 Pac. 155.

complaint, and upon the same day advised the respondent by letter of the service and filing of the interrogatories and the demurrer, and requested him to postpone action in the case until the defendant could be heard. On January 14, the relator served upon the respondent an application for a hearing upon his motion for default and upon the cause of action stated in the complaint. Upon the refusal of the court to hear his motion and grant him a default, an alternative writ was sued out of this court, which the relator now seeks to have made permanent, commanding the respondent to hear and determine such motion.

To this writ the respondent has both demurred and answered, which he may do under the rule announced in *State ex rel. Jefferson County v. Hatch*, 36 Wash. 164, 78 Pac. 796. The answer, among other things, recites that it is the opinion of the respondent that the service of the interrogatories within the twenty days constitutes an appearance in the cause, and entitles the defendant in the original cause to notice of all subsequent proceedings, and that the defendant had not been served either with the motion for default or with notice of the application to have the same heard. The relator urges that the defendant was in default, and therefore not entitled to notice of the further proceedings in the case. The only point to be determined is whether the service of the interrogatories upon the relator was an appearance, within the meaning of the statute. The law applicable to these facts will be found in Bal. Code, § 4886 (P. C. § 342), the pertinent part of which is as follows:

“A defendant appears in an action when he answers, demurs, makes any application for an order therein, or gives the plaintiff written notice of his appearance. After appearance a defendant is entitled to notice of all subsequent proceedings.”

Did the service of the interrogatories constitute “written notice of his appearance?” In the solution of this question it becomes germane to inquire the purpose of the statutory pro-

Feb. 1909]

Opinion Per Gose, J.

vision. Evidently the object to be accomplished was that the plaintiff might be apprised of the course to be pursued by the defendant, and whether he intended to litigate the case. Our code enjoins upon the courts the duty of giving a liberal interpretation to its provisions. Had the defendant served upon the relator a written instrument which simply stated that he had appeared in the action, no question could have been raised as to its compliance with the statute. The very purpose of the code was to simplify the practice, and this can be best accomplished by looking at the substance, rather than the form, of matters requiring consideration. It, therefore, follows that the service of the interrogatories was a substantial compliance with the statute, and that in legal effect it gave the relator written notice that the defendant had appeared. This construction is not without support in the authorities. In considering the question as to what constitutes an appearance, 3 Cyc., p. 504, par. 5, announces the following rule:

"Any action on the part of a defendant, except to object to the jurisdiction, which recognizes the case as in court, will amount to a general appearance."

The Nevada court, in discussing the question as to whether the statutory methods of appearance are exclusive, in *Curtis v. McCullough*, 3 Nev. 202, 212-13, thus states the rule:

"We cannot believe that the legislature intended to say that a defendant could not appear in an action except by filing an answer, demurrer, or giving written notice to the plaintiff. He certainly can in fact appear. We cannot therefore sanction the doctrine that he cannot appear so as to give the court jurisdiction of his person in any way except as specified in the section above referred to."

In *Baizer v. Lasch*, 28 Wis. 268, page 271, this view received support in the following language:

"The demand for a bill of particulars in the action before the justice was a proceeding to the merits, and a full appearance by Lasch, the defendant."

This construction is further recognized in *Long v. Newhouse*, 57 Ohio St. 348, 369, 49 N. E. 79, in the following language:

"It appears from the record in this case, that before the defendants filed their answer, in which they for the first time, by the first defense, challenged the court's jurisdiction of their persons, they had taken various objections to the plaintiff's petition. On November 2, 1893, by leave of the court first obtained some days before, they filed a motion to compel the plaintiff to attach to his petition an account of the items of his claim. This having been overruled, they afterward, on leave, filed a motion to require the plaintiff to separately state and number his causes of action; and this having been overruled, on February 5, 1894, they filed a motion to require the plaintiff to strike out various averments in his petition, being the motion heretofore noticed. This having been overruled, they sought leave to answer, and, the leave having been given, filed an answer, in the first defense of which they now challenge the court's jurisdiction over their persons. Manifestly, they could not do this after the numerous instances in which they had submitted themselves to its jurisdiction by invoking its judgment on the legal completeness, as well as the sufficiency of the plaintiff's petition."

Relator has called our attention to the case of *Vrooman v. Li Po Tai*, 113 Cal. 302, 45 Pac. 470, as supporting his view. We do not regard it as authority here, as the court expressly states that the "defendant entered into no stipulation in regard to the case," and that he made no appearance. The service of the interrogatories was a recognition on the part of the defendant that the case was in court, and through these interrogatories he sought to have the relator amplify the facts stated in the complaint. The fact that the interrogatories were prematurely served does not affect the question of appearance. Upon both principle and authority the defendant brought himself within the spirit of the statute, and was entitled to notice "of all subsequent proceedings."

For the reasons stated the writ will be denied.

RUDKIN, C. J., CHADWICK, FULLERTON, DUNBAR, CROW, and MOUNT, JJ., concur.

[No. 7613. Decided March 1, 1909.]

THE STATE OF WASHINGTON, *on the Relation of Oregon
Railroad & Navigation Company, Appellant, v.
RAILROAD COMMISSION OF WASHINGTON et al.,
Respondents.*¹

RAILROADS—REGULATION—RAILROAD COMMISSION—REVIEW OF ORDERS—CERTIORARI—RECORD—CERTIFYING EVIDENCE. Upon certiorari to review an order of the state railroad commission, the evidence used in other cases, under stipulation, may be certified by reference thereto in the return to the writ, it not being objected that it was not certified, as the form of certification is not material.

SAME—TRackage CONNECTIONS—POWER OF RAILWAY COMMISSION. Under Laws 1907, p. 538, § 3, vesting the state railroad commission with power to make regulations concerning the sufficiency of the trackage, railroad connections, siding, etc., and to order additional trackage or siding constructed, the commission has power to order physical track connections between different railroads.

STATUTES—AMENDMENTS—TIME OF TAKING EFFECT—EMERGENCY CLAUSE. Where an act passed two years previously is amended in various particulars, and by adding another section which provided that "an emergency exists and this act shall take effect immediately," the emergency clause has reference to the amendatory act and not to the original act, which accordingly takes effect upon approval.

RAILROADS—REGULATIONS—RAILROAD COMMISSION—ORDERS—JUDICIAL REVIEW—CONSTITUTIONAL LAW—DUE PROCESS OF LAW. The act of 1907, p. 538, § 3, conferring authority upon the state railroad commission to compel trackage connections between railroads and to determine who should pay the cost of the same, is not an interference with property, amounting to the taking of the same without due process of law; since the act provides for a review of the order of the commission by the superior court.

SAME—PROCEDURE—APPEAL—REVIEW—EVIDENCE. It is not material that the act requires a review of the order in the superior court upon the testimony taken before the railroad commission; since the act provides a complete remedy if the commission refuses to accept competent evidence, by a reversal for error with instructions to receive the evidence proffered and rejected.

¹Reported in 100 Pac. 179.

SAME—WITNESS—ATTENDANCE. The procedure before the commission is not objectionable for lack of due process because the attendance of witnesses cannot be compelled, since attendance may be compelled through an order of the superior court, under section 4, Laws 1907, p. 544.

SAME—PERJURY. Nor is it objectionable for want of penalties for perjury, since the general law of perjury applies.

SAME—PROCEDURE—COMMISSION AS ACCUSERS. Laws 1907, ch. 226, p. 536, authorizing the state railroad commission to hear and determine complaints against railroad companies as a mediatory court on matters of railroad regulation is not objectionable in that the commission may be the accuser and file the complaint against the companies, there being no presumption of partiality or unfairness from such fact.

SAME—NUMBER OF WITNESSES. The act is not objectionable in that it empowers the commission to limit the number of witnesses.

SAME—CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWERS. The act of 1907, p. 530, § 3, conferring authority upon the state railroad commission to order trackage connections between railroads is not an unlawful delegation of legislative power on the theory that the legislature has established no standards or principles for the guidance of the commission, since the act provides in many places that the enforcement of its provisions shall be just, fair and reasonable.

SAME—CONSTITUTIONAL LAW—GOVERNMENTAL POWERS—COMMINGLING—RESTRICTIONS. The railroad commission act creating a regulative railroad commission with executive and administrative duties may also confer on the commission judicial powers as a mediatory court, since the constitutional division of governmental powers into three separate departments applies only in a limited sense, and does not restrict one set of officers to one department exclusively.

APPEAL—REVIEW—FINDINGS. Findings of a railroad commission as to the necessity of track connections will not be disturbed unless the supreme court is satisfied that they were not justified by the evidence.

APPEAL—REVIEW—UNNECESSARY QUESTIONS—CONSTITUTIONAL LAW. The supreme court will not pass upon a constitutional question that is not a material issue in the case.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered March 5, 1908, affirming on certiorari an order of the state railroad commission respecting trackage connections, after a hearing before the court. Affirmed.

W. W. Cotton, Arthur C. Spencer, Zera Snow, and Wallace McCamant, for appellant, contended, among other things, that the legislature having established no standards or principles of regulation by which the commission is to be guided, any conferring of power without such standard or principles is a bald delegation of legislative authority. *United States v. Blasingame*, 116 Fed. 654; *United States v. Matthews*, 146 Fed. 306; *State v. Great Northern R. Co.*, 100 Minn. 445, 111 N. W. 289, 10 L. R. A. (N. S.) 250; *Mitchell v. State ex rel. Florence Dispensary*, 134 Ala. 392, 32 South. 687; *O'Neil v. American Fire Ins. Co.*, 166 Pa. St. 72, 30 Atl. 943, 45 Am. St. 650, 26 L. R. A. 715; *United States v. One Package of Distilled Spirits*, 88 Fed. 856; *Morrill v. Jones*, 106 U. S. 466, 1 Sup. Ct. 423, 27 L. Ed. 267; *Jannin v. State*, 42 Tex. Cr. 631, 51 S. W. 1126, 62 S. W. 419. While the right of regulation by the state of railway property and its use is admitted, this power of regulation is not unlimited, and all regulation of the business of common carriers, whether such regulation consists in the control of rates or the making of track connections, must be reasonable, and the question of the reasonableness or unreasonableness of all such attempted regulation is essentially a judicial question; and, if not permitted by the regulation under which it is undertaken, constitutes the taking of property without due process of law and a denial to the owner of the equal protection of the laws. *Chicago City R. Co. v. Chicago*, 142 Fed. 844; *Denver v. Bayer*, 7 Colo. 113, 2 Pac. 6; *Chicago etc. R. Co. v. Englewood Conn. R. Co.*, 115 Ill. 375, 4 N. E. 246, 56 Am. Rep. 173; *In re Marshall*, 102 Fed. 323; *Railroad Commission Cases*, 116 U. S. 307, 6 Sup. Ct. 334, 348, 349, 388, 391, 1191, 29 L. Ed. 636; *Chicago etc. R. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. Ed. 970; *Chicago etc. R. Co. v. Wellman*, 143 U. S. 339, 12 Sup. Ct. 400, 36 L. Ed. 176; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Lake Shore etc. R. Co. v. Smith*, 173 U. S. 684,

19 Sup. Ct. 565, 43 L. Ed. 858; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; *Chicago etc. R. Co. v. Tompkins*, 176 U. S. 167, 20 Sup. Ct. 336, 44 L. Ed. 417; *Wisconsin etc. R. Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194. In the absence of provisions in the state constitution authorizing the legislature to intermingle legislative, executive, and judicial powers, such intermingling of powers in the same body cannot be conferred. The Federalist, No. 47; Jefferson's, Notes on the State of Virginia, p. 195; Cooley, Constitutional Limitation, p. 87; Black, Constitutional Law, § 51; *Western Union Tel. Co. v. Myatt*, 98 Fed. 335, 348; *State v. Johnson*, 61 Kan. 803, 60 Pac. 1068, 49 L. R. A. 662; *Louisville & N. R. Co. v. McChord*, 103 Fed. 216; *Winchester etc. R. Co. v. Commonwealth*, 106 Va. 264, 55 S. E. 692. The railway commission law is unconstitutional because of its excessive penalties which follow the refusal to comply with the order, making it necessary to comply with the order rather than to resort to the courts for a decision as to the validity and reasonableness of the order; such legislation being a denial of the equal protection of the laws and an enforced taking of property without compensation. *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714; *Southern R. Co. v. McNeill*, 155 Fed. 756.

John D. Atkinson, Attorney General, and *J. B. Alexander*, and *E. C. Macdonald, Assistants*, for respondents, contended, among other things, that the railroad commission act of 1907, authorized the commission to inquire into and order track connections, and provide for full hearing upon all matters which are the subject of inquiry by the commission. *Atchison etc. R. Co. v. Denver etc. R. Co.*, 110 U. S. 667, 4 Sup. Ct. 185, 28 L. Ed. 291; *Wisconsin etc. R. Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194; *State ex rel. Lamar v. Jacksonville Terminal Co.*, 41 Fla. 377, 27 South. 225. The act is not unconstitutional in that it delegates to the commission any legislative power, but the

Mar. 1909]

Citations of Counsel.

act itself clearly and sufficiently furnishes standards and guides for the action of the commission in administering the law. *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294; *Wisconsin etc. R. Co. v. Jacobson*, *supra*; *People v. Long Island R. Co.*, 134 N. Y. 506, 31 N. E. 873; *New York etc. R. Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269; *Trustees of Saratoga Springs v. Saratoga Gas Elec. L. & P. Co.*, 122 App. Div. 203, 107 N. Y. Supp. 341; *Id.*, 191 N. Y. 123, 83 N. E. 693; *Chicago etc. R. Co. v. Jones*, 149 Ill. 361, 37 N. E. 247, 41 Am. St. 278, 24 L. R. A. 141; *State ex rel. Attorney General v. McGraw*, 13 Wash. 311, 43 Pac. 176; *In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279. The act gives ample provision for judicial review, and is not repugnant to the provisions of the 14th amendment of the constitution as a taking of property without due process of law. *Wisconsin etc. R. Co. v. Jacobson*, and *New York etc. R. Co. v. Bristol*, *supra*; *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 923; *Northern Pac. R. Co. v. Washington Territory*, 142 U. S. 492, 12 Sup. Ct. 283. The act is not objectionable or unconstitutional as containing judicial, legislative, and administrative powers intermingled or united. *Trustees of Saratoga Springs v. Saratoga Gas Elec. L. & P. Co.*, 190 N. Y. 562, 83 N. E. 693; *Dreyer v. Illinois*, 187 U. S. 71, 23 Sup. Ct. 28, 47 L. Ed. 79; *Missouri etc. R. Co. v. Shannon*, 100 Texas 379, 100 S. W. 138, 10 L. R. A. (N. S.) 681; *Bellingham Bay Imp. Co. v. New Whatcom*, 20 Wash. 53, 54 Pac. 774; *Selde v. Lincoln County*, 25 Wash. 198, 65 Pac. 192; *In re Westlake Avenue*, *supra*; *State ex rel. Matson v. Superior Court*, 42 Wash. 491, 85 Pac. 264; *In re Thompson*, 36 Wash. 377, 78 Pac. 899. The provision placing the burden of proof upon the railroad company, on review proceedings before the superior court, to show that the order of the commission is unreasonable, is a rule of evidence clearly within the power of legislative authority. *Atlantic Coast Line R. Co. v. Florida*, 203

U. S. 256, 27 Sup. Ct. 108, 51 L. Ed. 174; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Tilley v. Savannah etc. R. Co.*, 5 Fed. 641, 659; *Chicago etc. R. Co. v. Jones, supra*; *Burlington etc. R. Co. v. Dey*, 82 Iowa 312, 48 N. W. 98, 31 Am. St. 477, 12 L. R. A. 436; *Minneapolis etc. R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. Ed. 115; *Chicago etc. R. Co. v. Tompkins*, 90 Fed. 363. The act is not deficient in that the commission might discriminate against the railroad or might construe the law as not requiring it to issue process or procure court process for the benefit of the railroads. *Castillo v. McConnico*, 168 U. S. 674, 18 Sup. Ct. 229, 42 L. Ed. 622. The commission should not be confined strictly to the rules of evidence prescribed for courts, and it will be presumed that the commission knows or will recognize, if offer of proof is made, what facts or evidence have a bearing upon the case. *Trustees of Saratoga Springs v. Saratoga Gas & Elec. Co.* and *Reagan v. Farmers' Loan & Trust Co., supra*.

DUNBAR, J.—This is an appeal by the railroad company from a judgment of the superior court for Thurston county, affirming as reasonable and lawful an order of the railroad commission, ordering certain track connections between the appellant's lines of railway and the lines of the Northern Pacific Railway Company and the Spokane & Inland Railroad Company. A statement of facts and bill of exceptions was settled by the trial court, in which the evidence considered by the court below and a statement of the exceptions reserved were set out. On May 13, 1907, the commission caused to be filed with itself, as complainant, a complaint against the railroads interested, which, among other things, complained of the lack of track connections between the appellant's lines of railway and other railways in Eastern Washington. The complaint was verified by the chairman of the commission, and prayed for the interchange of cars, at Oakesdale and Garfield between the Northern Pacific, the

Mar. 1909]

Opinion Per DUNBAR, J.

Spokane & Inland and the O. R. & N. Company; at Connell, Pullman, and Farmington between the Northern Pacific and the O. R. & N. Company; at Waverly, Thornton and Colfax between the O. R. & N. Company and the Spokane & Inland; at Rosalia and Palouse between the Northern Pacific and the Spokane & Inland. Citation was duly issued, directing the attendance of the interested railroads. The appellant appeared in response to the citation, filed its objections to the jurisdiction of the commission, and filed an answer. The hearing being had, an order was made directing track connections to be made by the interested railroads as above indicated, and dismissing the petition as to the track connections at Rosalia and Palouse. We have considered this case in connection with the case of *State ex rel. Great Northern R. Co. v. Railroad Commission*, post p. 93, 100 Pac. 187, as most of the questions involved in the latter case are involved in the case now under discussion, although this case raises some additional questions. But the arguments and citations of authority in both cases will be considered in the discussion of this case. The order for track connections having been served, the appellant in due course filed a petition to review the order of the commission, in the superior court of Thurston county. A writ was issued, and pursuant thereto a hearing was had upon the proceedings, and evidence certified by the commission to the said superior court.

Here we may notice an objection raised to the manner in which the testimony in these different cases was certified. The complaint was an omnibus complaint, and the commission in its return referred to the evidence in certain other cases as evidence taken in the matter of this cause concerning the track connection order; and it was stipulated that the evidence referred to by the commission did contain the evidence which was taken in this case. We see no real objection to this manner of certifying the testimony or statement of facts to the superior court. It is not contended that the evidence

in the case was not certified, and the particular form in which it was certified seems to us not to be material.

The cause coming on for hearing, the appellant offered at the trial to produce and introduce before the court competent material and noncumulative evidence affecting the merits. The court refused to permit the evidence to be introduced or to permit witnesses to be sworn in support of the offer, holding that, under the statute creating a railroad commission and defining its duties and powers, no evidence could be introduced before the court in the case, and that the cause was required to be tried upon the testimony taken before the commission; to which ruling the appellant duly excepted on the ground that the ruling of the court deprived the appellant of its property without due process of law, and denied to it the equal protection of the laws, contrary to the fourteenth amendment to the constitution of the United States. With the view we take of the law, it is not necessary to produce here the testimony offered. Various assignments of error are made, but they are more in the form of assertion of what the law is than of the ordinary and regular assignment; so that we will consider the merits of the assignments as they are presented by the briefs and arguments.

The first contention of appellant is that the railroad commission law does not confer power or authority to institute an inquiry before the commission upon the question of track connections, or permit the commission to make any orders in respect thereto. The railroad commission law was passed in 1905, and it is conceded that, under the provisions of that act, the action of the commission complained of was not authorized; at least, the commission doubted its authority to act in the premises, and the act was amended in 1907 (Laws 1907, p. 536, chap. 226). It is contended by the appellant that the power given by such amendments did not confer the power of trackage connection. Section 3, page 538, of the Laws of 1907, vests the commission with power, upon complaint made, to make regulations concerning the sufficiency

Mar. 1909]

Opinion Per DUNBAR, J.

of the trackage, railroad connections, siding, equipments, etc., and to order that additional trackage or siding be constructed. It is contended by the appellant that this does not make provision for physical track connections. However, from a reading of the whole section, we are convinced that the legislature intended to confer power upon the commission to compel the making of physical track connections, and that this is in harmony with the spirit of all the provisions of the act.

It is next contended that, if it should be held that the commission law does confer such authority, such power will be found to have been conferred by virtue of the Laws of 1907, and that the amendments of 1907 were not in force when the hearings in this case were instituted and citations served. This contention we think is absolutely untenable. The law of 1907, including the amendments under discussion, was approved March 16, 1907, and the proceedings in this case were instituted in May, 1907. Section 21, the last section in the act of 1907, prescribes that there shall be added a section to be designated as section 39, providing that "an emergency exists and this act shall take effect immediately." It is not reasonable to conclude that the intention of the legislature was to enact an emergency clause to take effect upon an act of the legislature which had been in effect for two years prior thereto. The natural and obvious conclusion is that the emergency clause was intended to apply to the provisions of the act of 1907.

The next, and probably most important contention of the appellant, is that, if the amendments to the commission law of 1907 were in force and shall be construed as being intended to confer authority upon the commission in respect to track connections of railroads, then the legislation is void as a delegation of legislative authority which, by the constitution of the state, was lodged with the legislative assembly; because, as is claimed, if any power has been intended to be conferred, it is the bald power of arbitrary determination as to when,

where, and under what conditions track connections may be ordered and who shall pay for the same. It is admitted that, while the power of regulation of carriers may be exercised by the state directly by its legislature, or through the medium of the commission, yet the legislature must itself determine a standard for regulation by which the commission shall be guided; and it is asserted that this has not been done by the legislation in question, and that the action of the commission under consideration is an exercise of purely legislative authority. It is conceded by the appellant that the state may regulate railways, and that this regulation may take the form of ordering track connections between railroads under appropriate conditions; but it is contended that, before power can be conferred upon such subagency, the legislature itself, by legislative declaration, must establish standards or principles of regulation by which the commission shall be guided. For the purpose of the decision in this case it may be conceded now that the authorities cited by the appellant sustain the propositions contended for by appellant, viz: That use and enjoyment of property are essential attributes to property an interference with which constitutes a taking of property; that railway property impressed with a public use can be regulated whether the regulation take the form of a regulation of rates or of enforced track connections, but that this power of regulation is not unlimited; that all regulation by the state must be just and reasonable, and that the question of the reasonableness or unreasonableness of the regulation is essentially a judicial question, and that the owners of railway property against whom regulation is sought to be enforced have a right to demand from the courts an inquiry as to the validity of this interference and submit to a court as a judicial question all controversies which may arise as to the lawfulness or reasonableness of the regulation. But an examination of the cases cited convinces us that they have no application to the case at bar, for the reason that the right to a judicial determination of the questions involved in the con-

troverſy—the main propoſition—is accorded to the appellant in this caſe by the law of 1907.

One of the main caſes relied upon by appellant here, and alſo by appellant in caſe No. 7616, is *Chicago etc. R. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. Ed. 970, but that caſe was decided expreſſly upon the theory that no judicial determination was permitted. Juſtice Blatchford, in writing the opinion for the court in that caſe, ſaid :

“The conſtruction put upon the ſtatute by the ſupreme court of Minnesota muſt be accepted by this court, for the purpoſes of the preſent caſe, as concluſive, and not to be re-examined here as to its propriety or accuracy. The ſupreme court authoritatively declares that it is the expreſſed intention of the legiſlature of Minnesota, by the ſtatute, that the rates recommended and published by the commiſſion, if it proceeds in the manner pointed out by the act, are not ſimply advisory, nor merely *prima facie* equal and reaſonable, but final and concluſive as to what are equal and reaſonable charges ; that the law neither contemplates nor allows any iſſue to be made or inquiry to be had as to their equality or reaſonableneſs in fact ; that, under the ſtatute, the rates published by the commiſſion are the only ones that are lawful, and, therefore, in contemplation of law the only ones that are equal and reaſonable ; and that, in a proceeding for a mandamus under the ſtatute, there is no fact to traverse except the violation of law in not complying with the recommendations of the commiſſion. In other words, although the railroad company is forbidden to eſtabliſh rates that are not equal and reaſonable, there is no power in the courts to ſtay the hands of the commiſſion, if it chooſes to eſtabliſh rates that are unequal and unreaſonable.”

It certainly cannot be contended that our ſtatute could be ſo conſtrued, for the ſtatute itſelf eſpecially provides for a review by the ſuperior court, from which court there is an appeal to the ſupreme court of the ſtate. It is given a review, not only upon the regularity of the proceedings, but upon the merits. It is true that the ſtatute provides that the court ſhall hear the caſe only upon the teſtimony that is taken before the

commission; but it also provides a complete remedy if the commission refuses to accept competent testimony, and if it admits incompetent testimony, of course, the reviewing court would simply disregard it. The supreme court of this state is bound by the testimony which is introduced in the superior court and comes up in the statement of facts, and yet it could not well be said that litigants are deprived in any way of obtaining the judgment of the supreme court on questions which have been litigated in the superior court. The statute provides, in so many words, that any railroad or express company affected by the order of the commission, and deeming it to be contrary to the law, may institute proceedings in the superior court of the state of Washington in the county in which the hearing before the commission upon the complaint has been held, and have such order reviewed and its reasonableness and lawfulness inquired into and determined. Time is given to take this review. All the testimony upon which the commission acted is brought before the court, and we are utterly unable to conclude that the question is not finally determined by a judicial arbiter.

Many statements are made by counsel for appellant in regard to the provisions of the statute; for instance, it is asserted by the appellant in *State ex rel. Great Northern R. Co. v. Railroad Commission, supra* (No. 7616), that this legislation is cunningly devised to give to the common carrier the right to a proceeding which is a judicial investigation in name only, and utterly lacking in the substance and quality of an ordinary judicial proceeding, and to prohibit the courts from pursuing any line of investigation except that which has been dictated by the commission, or having before it any facts or evidence except such as the commission may determine. On page 98 of appellant's brief it is asserted that the vice of the statute consists in limiting the court in such inquiry to such evidence as the commission may see fit to take or certify; but a perusal of the statute itself shows that there

is no justification for such assertions. Section 5 of the Laws of 1907, page 548, provides as follows:

“And the court before which such hearing is had, in case it finds any such findings so sought to be reviewed unjust, incorrect, unreasonable, unlawful or not supported by the evidence, shall make new and correct findings to take the place of such as may not be sustained, unless such findings are set aside and reversed for error on the part of the commission in rejecting evidence properly proffered, in which case it shall remand such hearing to the commission with instructions to *receive the evidence so proffered and rejected;*”

a provision which flatly contradicts the statement that the evidence before the court is limited in inquiry to such evidence as the commission may see fit to take or certify. Appellant also states, on page 113 of its brief, that there is no provision whatever for any review by the superior court of any decision which the commission may make in the course of its proceedings, either in rejection or receipt of evidence which may be offered, or any review provided for any error in ruling in the course of the examination of witnesses. The portion of the statute which we have read equally answers this statement. The statute goes further and provides an appeal to the supreme court of the state, and provides that:

“In case the supreme court finds any findings so sought to be reviewed unjust, incorrect, unlawful or unreasonable, or not supported by the evidence, it shall either make and render proper findings or remand the same to the superior court with instructions to make proper findings on the evidence already submitted, *unless the same is reversed for error in rejecting evidence properly proffered, in which case the hearing shall be remanded to the commission with instructions to receive the evidence so proffered.*” Laws 1907, p. 548, § 5.

The statement that, if a witness shall appear and refuse to testify, there is no means of compelling testimony, is also answered by the statute as follows:

“The said commission before which the testimony is to be given or produced, in case of the refusal of any witness to attend, or testify, or produce any papers required by the

subpoena, shall report to the superior court in and for the county in which the proceeding is pending by petition, that due notice has been given of the time and place of attendance of said witnesses, of the production of said papers, and that the witness has been summoned in the manner provided in this act, and that the fees and mileage of the witness has been paid, or tendered to the witness for his attendance and testimony, and that the witness has failed or refused to attend or produce the papers required by the subpoena, before said commission, in the cause or proceeding named in the notice and subpoena, and ask an order of the said court, compelling the witness to attend and testify before the said commission. The court upon the petition of the commission shall enter an order directing the witness to appear before the said court at a time and place to be fixed by the court in such order, and then and there show cause why he has not responded to said subpoena." Laws 1907, p. 544, § 4.

It then provides that, in case the witness does not purge himself, he shall be dealt with as for contempt of court. It is true that there are no penalties for perjury, but the general law on the subject of perjury provides for that. The penalty for perjury is not necessarily provided in every statute that provides for the taking of the testimony of a witness. These statements are repeated in many forms, and arguments are based upon the assumptions of the statements, and authorities are cited in support of the unconstitutionality of a law such as is indicated by the statements made; but as we have seen, the statements not being justified by the law itself, such authorities are not in point, and we have therefore not reviewed them.

It is insisted that, inasmuch as the commission makes out the complaint, the commission is an accuser, and it is treated by the arguments of counsel as a tribunal in opposition to the just interests of the railroad companies. This court cannot act on such an assumption. The commission was provided for not for the purpose of interfering with any just and legal rights of the railroad companies or other corporations, but as a mediatory court standing between the private interests

Mar. 1909]

Opinion Per DUNBAR, J.

of the country and the interests of the carriers; and the fact that the complaint in response to petitions is made by the commission formally is not such a fact as would warrant the assumption or suspicion that the commission was not acting justly and impartially. It is true that the forms of law and procedure under which this commission is acting are not in all respects like the forms and procedure governing other courts; and in the language of many of the cases cited by the counsel for appellant, and repeated by the appellants themselves in their arguments, in some respects "it is not a proceeding under the forms and with the machinery provided by the wisdom of successive ages." But it occurs to us that it makes no difference whether it is a proceeding under the forms and with the machinery provided by the wisdom of successive ages, or whether it is under the powers and proceedings provided by this age. Law is a progressive science, and must necessarily regard the changing conditions of society and of the business of the country, and the legislature and courts of today ought certainly to be as well qualified to provide machinery for the guidance of a commission as was the law-making power two hundred years ago. The essential idea does not take cognizance of the antiquity of the powers and machinery under which the commission is acting, but of the question whether, under such powers and the working of such machinery, the respective legal rights of the carriers and the people are preserved. A careful examination of the whole act, we think, refutes the statements made by the attorneys for appellant that the law is cunningly devised for the purpose of preventing railroads from obtaining just judgments, and repels the presumption that the commission provided for by the legislature is appointed for the purpose of oppressing railroad companies. We think, on the contrary, the presumption must be that the commission will act with fairness towards all parties.

It is also objected that the law provides that the commission may limit the number of witnesses. We do not think this

is an unreasonable requirement. With regard to the contention that a standard must be erected by the legislature for the guidance of the commission, we think that question is answered by the law itself, which provides in many places throughout chapter 226 that the enforcement of these different provisions shall be just, fair, and reasonable. When this imposition is placed upon the commission, with the right of the railroad company to appeal to the courts to determine judicially whether the action of the commission was just, fair, and reasonable, we think all constitutional rights are fully protected.

The contention is also made that the commission act provides for the intermingling of legislative, executive, and judicial power. If we have given the statute proper construction, the concessions made by counsel for appellant as to the character of the commission laws which it is within the powers of the legislature to enact, renders unnecessary a discussion of this proposition; but yielding the courtesy of discussion, while there is no question that the constitution of the state recognizes a division of the powers of the state into three separate co-ordinate departments, viz., legislative, executive, and judicial, it is well established that the special jurisdiction of each is understood to be applied in a limited sense, and it is not meant that they must be kept wholly and entirely distinct without any connection or dependence whatever or connecting link between them. Or, as was said by this court in *Bellingham Bay Imp. Co. v. New Whatcom*, 20 Wash. 53, 54 Pac. 774, if all quasi judicial powers were taken from administrative and executive officers, the courts would be incumbered with useless litigation, and the administration of the government would become so expensive that it would be intolerable. This question was examined at length in that case, and many cases reviewed, and the logic of the opinion and the conclusion reached is opposed to appellant's contention. In addition to this, no case has been cited by appellant, nor have we been able to find any, which sustains the view contended for. As to the public necessity for the track connections, we are not

Mar. 1909]

Syllabus.

prepared to say that the finding of the commission in that respect was not justified by the testimony.

It is also contended by appellant that the law is unconstitutional because of the alleged excessive penalties which follow the refusal to comply with the order of the commission. This, in any event, would affect the constitutionality of only that portion of the act in relation to penalties. But, as counsel for appellant and respondents both agree that the penalties are not involved in this case, for the reason that the order of the commission provides for a subsequent order specifying the proportionate amount to be made by each of the railroads of the expense of making such connections, and that such subsequent order has never been made, we will decline to pass upon the question until it is a material issue in a case presented.

Finding no error in the record, the judgment is affirmed.

RUDKIN, C. J., CROW, FULLERTON, and MOUNT, JJ., concur.

CHADWICK and GOSE, JJ., took no part.

[No. 7616. Decided March 1, 1909.]

THE STATE OF WASHINGTON, *on the Relation of Great Northern Railway Company, Appellant, v. RAILROAD COMMISSION OF WASHINGTON et al., Respondents.*¹

CARRIERS — REGULATION — FREIGHT RATES — POWER OF RAILROAD COMMISSION — MAXIMUM RATES — EFFECT — STATUTES — REPEAL — CONSTRUCTION. The constitutional provision requiring the legislature to establish reasonable maximum transportation rates, does not prevent the delegation of such power to a railroad commission, since it further provides that the legislature may establish a railroad and transportation commission and define its powers; hence it does not prevent the establishment of a regulative commission with power to fix maximum rates in conflict with the maximum rate laws, and Laws 1907, providing such a commission, impliedly repeals former maximum rate laws of the state, upon the taking effect of conflicting rates established by the commission.

¹Reported in 100 Pac. 184.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered March 19, 1908, affirming, on certiorari, rulings of the state railroad commission, fixing certain joint freight rates, after a hearing before the court. Affirmed.

L. C. Gilman (B. S. Grosscup, of counsel), for appellant.

John D. Atkinson, Attorney General, and *J. B. Alexander, Assistant (Harold Preston, of counsel)*, for respondents.

DUNBAR, J.—On the 17th day of May, 1907, a complaint was filed by the railroad commission of Washington against this appellant, the Great Northern Railway Company, and other railroad companies doing business in the state of Washington, viz.: the Northern Pacific Railway Company, the Oregon Railroad & Navigation Company, the Washington and Columbia River Railroad Company, the Spokane Falls & Northern Railway Company, and the Spokane & Inland Railroad Company. The complaint charged that the said companies had refused to fix joint rates from points in Eastern Washington to Puget Sound seaports. Citation was issued. The companies all appeared and answered. Testimony was taken before the commission, and on the 20th day of September, 1907, the commission made an order whereby, among other things, there were established joint rates on wheat from points on the line of the Oregon Railroad & Navigation Company over the lines of said company and the lines of the Great Northern Railway Company to Seattle, and joint rates on wheat from points on the main line of the Great Northern over said line and the lines of the Northern Pacific Railway Company to Tacoma. From this order the Great Northern Railway Company sued out a petition for a writ of review.

The writ was issued, and pursuant thereto the proceeding before the commission was certified to the superior court of Thurston county, and the cause assigned for hearing. Prior to the hearing of the cause, the Great Northern Railway

Mar. 1909]

Opinion Per DUNBAR, J.

Company made a motion for leave to take evidence before the court to supplement its evidence introduced before the commission. This motion was denied by the court and exception taken. The court, in short, affirmed the rulings of the commission, and an appeal is taken to this court from the judgment of the superior court.

The main proposition discussed by the appellant in this case, viz., that the law is unconstitutional for the reason that no right is given the appellant under the provisions of the commission act to have the matters in dispute determined by a court of justice, was fully discussed in a case just decided by this court, viz., *State ex rel. Oregon R. & Nav. Co v. Railroad Commission*, ante p. 17, 100 Pac. 179, and the constitutionality of the law was there sustained.

The appellant, however, makes the further contention that the order made by the commission and confirmed by the lower court was invalid in that it was in conflict with the maximum rate acts passed by the legislature in 1893 and 1897, the contention being that these statutes fixed the rates for transportation of wheat and that the rates so fixed, until otherwise decided by the courts, must be deemed reasonable and just rates. The commission act was passed subsequently to either of the acts referred to, but during the same session that the rate act of 1907 was passed. Very little argument is presented by counsel in favor of this contention, and no authorities are cited excepting the opinion of Judge Hanford, of the United States Circuit Court for this District. This opinion of Judge Hanford seems to be based upon a provision of the state constitution, viz., § 18 of art. 12, which provides that

"The legislature shall pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight, and to correct abuses and prevent discrimination and extortion in the rates of freight and passenger tariffs on the different railroads and other common carriers in the state, and shall enforce such laws by adequate penalties. A railroad and transportation commission may be established and its powers and duties fully defined by law."

If we accept the first proposition laid down by appellant in its brief as being definitely established as the law of the land, viz., that the legislative authority may, either directly or indirectly through the agency of a commission, fix the rates of transportation to be charged by common carriers, provided always that the rates thus fixed are reasonable, there seems to be no possible logical reason by which this contention of appellant can be sustained. Nor can we exactly understand what effect the provisions of the constitution which the learned Judge of the Circuit Court for this District seemed to consider as controlling have; for if the legislature had power—which is now considered to be unquestionably the law—to establish reasonable maximum rates of charges for the transportation of passengers and freight without constitutional authority, the fact that the constitution imposed the duty of so establishing such rates could not possibly be construed as taking away any right that the legislature had to delegate such power. So that it becomes a question altogether of the construction of the act of the legislature, and the duty of the court is to ascertain the legislative intent. While it is true that the former acts have not been specifically repealed, and while it is also unquestionable that repeals by implication are not favored, it is as well established that, where there is a conflict between a statute and a subsequent statute, the subsequent statute, being the later expression of the legislative will upon the subject, must be considered in force and to operate as a repeal by implication of all prior acts or parts of acts in conflict therewith. This question was discussed in *State v. Rogers*, 22 Ore. 348, 30 Pac. 74, an Oregon case, and the court announced the law as we have stated above, citing *Little v. Cogswell*, 20 Ore. 345, 25 Pac. 727, and *United States v. Tynen*, 11 Wall. 88, 20 L. Ed. 153.

If the constitution is to be submitted to construction, it is significant that, in connection with the constitutional mandate which is relied upon to prevent the delegation of power to

Mar. 1909]

Opinion Per DUNBAR, J.

fix rates, and at the end of the same section, the provision is made that a railroad and transportation commission may be established and its powers and duties fully defined by law. In consideration of the fact that it is common knowledge that the regulation of rates is about the first practical duty which devolves upon a railroad commission, there is scarcely room for the contention that the framers of the constitution intended to prevent the legislature from clothing the railroad commission with power to exercise this usual duty. It has been well established that, if a state constitution is silent upon a subject, the legislature of the state has power to establish a railroad commission with power to establish a schedule of rates for railroads, and the provision of our constitution was merely declaratory of the power of state regulation.

This whole question was discussed at length in *Chicago etc. R. Co. v. Jones*, 149 Ill. 361, 37 N. E. 347, 41 Am. St. 278, 24 L. R. A. 141. There the court decided, under a constitutional provision similar to ours, that a railroad and transportation commission could be established and its powers and duties defined by law. The reason given in many of the cases for the legislative establishment of a commission of this character is that rates established by a commission are more flexible than those established by the legislature; that railroad rate conditions change rapidly and radically; and that rates established by one session of the legislature, long before another session convened, might be oppressive, either to the carriers or to the shippers; and that, as long as the rates established by the commission were reasonable rates, which question might finally be determined judicially, there was no invasion of constitutional rights. From a reading of the commission act of 1907, it plainly appears to us that it was the intention of the legislature that the act empowering the commission to regulate rates worked a repeal of the rates established, or that the repeal would become effective upon the action of the commis-

sion establishing rates which were in conflict with the rates theretofore established by the legislature.

Finding no error in the record, the judgment is affirmed.

RUDKIN, C. J., CROW, FULLERTON, and MOUNT, JJ., concur.

CHADWICK and GOSE, JJ., took no part.

[No. 7571. Decided March 1, 1909.]

M. C. WARREN, *Respondent*, v. HARRY HERSHBERG,
Appellant.¹

JUDGMENT—VACATION—GROUNDS—ERROR OF LAW. A motion to vacate a judgment under Bal. Code, § 5153, cannot be made for error of law.

SAME—DILIGENCE—SUFFICIENCY OF SHOWING. A motion to vacate a judgment for irregularities or fraud under Bal. Code, § 5153, cannot be made more than two years after entry of the judgment without a showing of unavoidable casualty or misfortune preventing the party from defending and diligence in making his motion.

Appeal from an order of the superior court for King county, Morris, J., entered March 19, 1908, striking out an answer and cross-complaint, on motion of plaintiff, in an action to quiet title. Affirmed.

Blaine, Tucker & Hyland, for appellant.

Harold Preston and Raymond D. Ogden, for respondent.

CROW, J.—This action was commenced by M. C. Warren against Harry Hershberg and others, defendants, to quiet the plaintiff's title to certain land in King county. The defendant Harry Hershberg, being a nonresident of the state, was served by publication of summons, and made default. On January 11, 1905, after a default had been regularly entered against him, a judgment and decree was entered in accordance with the prayer of the complaint, quieting the plaintiff's title.

¹Reported in 100 Pac. 149.

Mar. 1909]

Opinion Per CROW, J.

More than two years thereafter, on September 27, 1907, the defendant Harry Hershberg appeared by his attorneys and filed a motion to vacate the decree, and also filed therewith his proposed answer and cross-complaint, by which he sought to vacate certain tax foreclosure proceedings and set aside certain tax deeds under which the plaintiff, through her grantors, claimed title. Thereupon plaintiff moved the court to strike the defendant's motion and proposed answer and cross-complaint. From an order granting the motion and striking the answer and cross-complaint, the defendant Harry Hershberg has appealed.

By his assignments of error, the appellant in substance contends that the trial court erred in granting respondent's motion to strike his proposed answer and cross-complaint, and in denying his motion to open the default and try the issues tendered by him. The record shows that the service by publication upon the appellant was regular and in all respects in strict compliance with the requirements of the statute; that default was properly entered; that final decree quieting the respondent's title was made and entered on January 11, 1905; that the appellant for a period of more than two years failed to move against or attack the same; that he has made no explanation of such delay; that he has shown no unavoidable casualty or misfortune preventing him from defending, and that the only substantial showing upon which he relies for a vacation of the judgment and permission to defend is contained in the allegations of his proposed answer and cross-complaint. In this pleading he alleged that the respondent only claimed title through her immediate grantors, under certain tax foreclosure proceedings and sales, which he alleges were void; the summons upon which they were based being defective and insufficient to confer jurisdiction upon the court. Appellant evidently seeks to obtain a vacation of the decree quieting respondent's title, and permission to try the issues tendered by his answer and cross-complaint, under the provisions of Bal. Code, § 5153 (P. C. § 1033); but it is

manifest that he can obtain no relief thereunder. The right to obtain a vacation of the decree in this action is statutory, and we fail to see that he has brought himself within any of the requirements of the section above mentioned. The substance of the allegations of his answer and cross-complaint, now urged in his brief as a sufficient reason for permitting him to appear and defend, is that the trial court erred in entering the decree. In *Kuhn v. Mason*, 24 Wash. 94, 64 Pac. 182, this court said:

"The right to a vacation of judgments, while it existed at common law for certain specific reasons, viz., fraud and collusion, is in this state statutory; and, if appellant brings himself within the statute at all, it is within the provisions of subd. 3, of § 1, chapter 17, title 28, Bal. Code, which provides for the vacation of a judgment for mistakes, neglect or omission of the clerk or irregularity in obtaining the judgment or order. There is no mistake, neglect, or omission of the clerk alleged, but it is alleged that the judgment was irregularly obtained. But the irregularity provided for by the statute does not mean an irregularity such as is shown by the petition in this case, viz., that the court misconstrued the law. Irregularities which are generally invoked for the purpose of vacating a judgment, and which will justify a vacation of the judgment after term time, are where a judgment was entered in favor of the plaintiff before the time for answering had expired, or where the judgment was entered while there was an answer or demurrer on file and not yet disposed of, and other irregularities of this character."

Neither by his motion, nor his answer and cross-complaint, had the appellant explained or attempted to explain his delay of more than two years after entry of the decree before commencing proceedings to open, vacate and set aside the same. In *Kuhn v. Mason*, *supra*, this court laid down the rule as to diligence in commencing such proceedings, saying:

"Again, the petition does not show diligence. It is insisted by the appellant that he has met the requirements of the statute when he files his petition within a year, but such is not the voice of authority. The rule is thus announced in 15 Enc. Pl. & Pr., p. 268: 'Without regard to the provision of the

Mar. 1909]

Syllabus.

statutes as to the time within which an application to vacate or set aside a judgment shall be made, it may be laid down as a general rule, that, with certain exceptions—as in the case of void judgments—a party must institute such proceeding with due diligence, and his right to obtain relief against the judgment will be barred by unreasonable and unexplained laches in applying therefor'; and citing a great many cases."

The appellant has shown no diligence whatever. It is not the policy of the law to disturb judgments after the statutory period has elapsed within which they may be attacked, no good and sufficient excuse for such delay being shown.

The trial court committed no error in striking appellant's motion and proposed answer and cross-complaint. The judgment is affirmed.

RUDKIN, C. J., DUNBAR, MOUNT, FULLERTON, GOSE, and CHADWICK, JJ., concur.

[No. 7754. Decided March 1, 1909.]

*In the Matter of the Petition of GROVER HOLLOPETER for Writ of Habeas Corpus on Behalf of Imogene Hollopeter.*¹

MARRIAGE—VALIDITY—FRAUD IN SECURING LICENSE. Fraud or forgery in securing a marriage license for a minor without the consent of the parents does not invalidate the marriage, there being no statute so providing.

SAME—MARRIAGE OF MINOR—AGE OF CONSENT. A female of the age of fourteen is within the common law age of consent, and is not, as a matter of law, incapable of contracting marriage.

SAME—EFFECT OF STATUTE. The law fixing the age of eighteen as the age under which a female cannot consent to carnal knowledge does not overcome the common law age of consent to marry.

SAME—ANNULMENT—ACTIONS BY PARENTS OF MINOR—PARTIES—CAPACITY TO SUE. Parents cannot maintain an action to annul the marriage of their minor child who was incapable of consenting because under legal age, procured by fraud and without the parent's consent; since Bal. Code, § 4477, authorizes such actions only at the suit of the party under disability.

¹Reported in 100 Pac. 159.

HUSBAND AND WIFE—INFANTS—RIGHT OF HUSBAND TO SOCIETY OF WIFE—ACTION FOR CUSTODY—PARTIES. A minor husband becomes of full age upon the performance of the ceremony, and may maintain an action in his own name to secure the custody and society of his wife.

Appeal from a judgment of the superior court for Thurston county, Irwin, J., entered August 24, 1908, upon findings annulling a marriage, and denying a writ of *habeas corpus* sought by the husband to secure the release of his wife, after a trial on the merits of *habeas corpus* proceedings, consolidated for trial with an action by the wife's parents for the annulment of the marriage. Reversed.

King & King and *E. N. Steele*, for appellant. A marriage performed regularly even without the formality of parental consent or the issuance of a license where these are required by statute, is valid and binding. *Askew v. Dupree*, 30 Ga. 173; *State v. Walker*, 36 Kan. 297, 13 Pac. 279, 59 Am. Rep. 556; *Holmes v. Holmes*, 6 La. 463, 26 Am. Rep. 482; *Gardiner v. Manchester*, 88 Maine 249, 33 Atl. 990; *Hargroves v. Thompson*, 31 Miss. 211; *Haggin v. Haggin*, 35 Neb. 375, 53 N. W. 209; *State v. Robbins*, 28 N. C. 23, 44 Am. Dec. 64; *State v. Parker*, 106 N. C. 711, 11 S. E. 517; *Connors v. Connors*, 5 Wyo. 433, 40 Pac. 966; *Lacoste v. Guidroz*, 47 La. Ann. 295, 16 South. 836; *Hiram v. Pierce*, 45 Maine 367, 71 Am. Dec. 555; *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 791; *Hunter v. Milam* (Cal.), 41 Pac. 332; *Parton v. Hervey*, 1 Gray 119; *Fitzpatrick v. Fitzpatrick*, 6 Nev. 63; *Warwick v. Cooper*, 5 Sneed (Tenn.), 659; 16 Am. & Eng. Ency. Law (2d ed.), p. 264. The marriage being valid, a suit for annulment cannot be maintained by the parents or next friend or guardian. 14 Cyc. 653; *Mohler v. Shank's Estate*, 93 Iowa 273, 61 N. W. 981, 57 Am. St. 274, 34 L. R. A. 161; *Worthy v. Worthy*, 36 Ga. 45, 91 Am. Dec. 758; *Besore v. Besore*, 49 Ga. 378; *Birdzell v. Birdzell*, 33 Kan. 433, 6 Pac. 561, 52 Am. Rep. 539; *Winslow v. Winslow*, 7 Mass. 95; *Richardson v. Richardson*, 50 Vt. 119; *Bradford*

Mar. 1909]

Opinion Per CHADWICK, J.

v. Abend, 89 Ill. 78, 31 Am. Rep. 67; 7 Ency. Plead. & Prac. p. 61, § 6.

Vance & Mitchell, for respondents.

CHADWICK, J.—This was an action brought originally by Grover Hollopeter, as husband of Imogene Hollopeter, on her behalf, alleging that Nat Glenn and Mrs. Nat Glenn, her parents, were restraining her of her liberty. From the petition and return, it appears, that on the 7th day of July, 1908, petitioner procured a marriage license to be issued by the county auditor of Thurston county, authorizing the marriage of Grover Hollopeter and Imogene Glenn; that they were married on the same day by a minister of the gospel; that they went on a wedding trip to North Yakima and Tacoma, where they remained several days; that the marriage was consummated; that Imogene Glenn was a minor of the age of fourteen years, and Grover Hollopeter a minor of the age of nineteen years; that the writing purporting to give the consent of Mrs. Glenn to the issuance of a license was made out and signed by her daughter Imogene, as she contends, with her mother's permission and consent and in her presence. The mother, however, denies that this was so. The testimony is conflicting, and we are content to hold with the trial court that Mrs. Glenn did not in fact consent to the marriage. Petitioner was arrested at Tacoma, while returning from the wedding trip, upon a charge of forgery. While he was in custody, Mr. and Mrs. Glenn forcibly took possession of the person of Imogene, and have since restrained her of her liberty. A proceeding for annulment of the marriage was begun by the parents of Imogene while the *habeas corpus* proceeding was pending. Both cases were consolidated, and are now brought here upon the appeal of Grover Hollopeter.

From the testimony it appears that Grover Hollopeter was a young man of full growth, and has been for some time past earning his own living, and while at work has earned from three to four dollars per day. The testimony would also indi-

cate that Imogene was a young woman of mature mind. The court found:

"That Imogene Glenn was, on the —— day of July, 1908, of the age of 14 years; that on said date the defendant was of the age of 19 years; that on the said last mentioned date the said minor child, Imogene Glenn, and the said minor, Grover Hollopeter, procured a license to marry from the auditor of above county and state, and thereafter were united in marriage by a properly ordained minister of the gospel.

"That the parents, or either of them, of the said minor child, Imogene Glenn, did not consent in writing, or at all, as required by law, to the issuance of said marriage license or to the said marriage; that the signature purporting to be the signature of one of the parents of said Imogene Glenn was affixed thereto by the said minor without the knowledge or consent of her parents or either of them, all of which facts were known to the defendant, Grover Hollopeter; that the parents of the said Grover Hollopeter did not sign the written consent to the marriage of their son, and that their names were affixed to said consent by one Mrs. —— Gilbert, a daughter of defendant's parents; that both of the said parents of defendant are able to read and write and that they had in a vague and general way authorized their daughter, Mrs. Gilbert, to consent to the said marriage, the vague authorization having no reference to any particular time; that the defendant's parents appeared in court and expressed their willingness to ratify, and did ratify, in so far as they might, the act of their said daughter in signing their names to said consent.

"That after the marriage between said Imogene Glenn and Grover Hollopeter, that they did cohabit together as husband and wife, and did continue to so cohabit for over a week and until the plaintiff herein N. G. Glenn and R. A. Glenn by main force took the said Imogene Glenn from the said Grover Hollopeter, and took her to their home where they ever since said time have kept her confined against her will and against the will and desire of this defendant.

"That Grover is able and willing and desires to make a home for the said Imogene Glenn and provide for her, and that the said Imogene Glenn is willing and desires to make her home with the said defendant."

Mar. 1909]

Opinion Per CHADWICK, J.

From which facts the court make the following conclusions of law:

"That Imogene Glenn being of non-age, her parents being her natural and lawful guardians, may on her behalf, and on their own behalf, as such parents, maintain an action to avoid and annul such marriage. .

"That the said marriage should be annulled, avoided and set aside as having been entered into by parties not capable of contracting, and the conditions precedent to the issuance of the marriage license never having been complied with."

We are asked to hold the marriage void, for the reasons that the license was obtained by fraud, and that Imogene was incapable of consenting thereto. Assuming the fact to be as found by the lower court, that the mother of Imogene did not consent to the marriage of her daughter, this would not avoid the marriage in the absence of a statute expressly declaring it to be so. 19 Am. & Eng. Ency. Law (2d ed.), p. 1190; 26 Cyc. 835.

In the absence of any express declaration that a marriage without a license is void, the marriage is universally held to be valid. 19 Am. & Eng. Ency. Law (2d ed.), 1191. A party to the wrongful issuance of a license, or who wrongfully performs the marriage ceremony, may be punished. Bal. Code, §§ 4482, 4483 (P. C. §§ 6275, 6276); 26 Cyc. 835. A party who procures the issuance of a marriage license by means of a fraudulent affidavit may be convicted of forgery. But a sound public policy has declared that the validity of the marriage in such cases shall not be inquired into. Bishop, Marriage, Divorce and Separation, § 529.

Imogene was within the common law age of consent, so that we cannot hold, as a matter of law, as did the lower court, that she was incapable of consenting to the marriage. But it is argued that the common law age of consent is overcome in this state by the enactment of the law fixing the age of eighteen as the age under which a female cannot consent to carnal sexual intercourse. The fact that the law permits the marriage of minors at all is enough to overcome the argu-

ment advanced in behalf of this proposition. To so hold would be to say, in effect, that the enactment of the statute covering and defining the crime of statutory rape was a repeal of the law permitting infants to marry, even though they had the consent of their parents. Such was manifestly not the intention of the statute, for it is sometimes important that those under the statutory age should marry, and under certain conditions such marriages are to be encouraged. Applied to a particular case, the rule that infants of the age of fifteen and twenty, as the parties now are in this case, may marry, may seem harsh. But it must be remembered that it is the same rule that would sustain the marriage of a man all but twenty-one and a woman who is not quite eighteen. Experience has taught us that the rule that marriage solemnized and consummated without the consent of a parent is valid, is not only salutary but wholesome and necessary, although there are now, and always will be, those who oppose the thought of marriage under legal age.

In England it was sought to prevent the voluntary marriage of persons under legal age, by providing that marriages solemnized under a license should be void when entered into without the consent of the father if living, or if dead, of the guardian or mother. Lord Hardwick's Marriage Act, 26 George II, chap. 33. All manner of mischiefs followed the enactment of this law. Marriages consented to by a mother, the father being beyond seas and supposed to be dead, were declared void. Children were bastardized, and subsequent consent of the parents held to be ineffectual to sustain the marriage. The courts finally endeavored to cure the hardship of the rule by holding that the burden was on the Crown or parent to prove the negative of consent, and by finding consent from the slightest circumstances. So anomalous had the situation become that Parliament finally passed an act, 3 George IV, chap. 75, followed by 19 and 20, Victoria, chap. 119, providing that, although the consent of the parents or guardians be required by law, the absence of it would in

Mar. 1909]

Opinion Per CHADWICK, J.

no case render the marriage void. This is the law in every state of the Union where the question has been passed upon, with the possible exception of the state of Texas.

The remaining question, Have the parents of Imogene capacity to sue to annul the marriage, is determined by the foregoing discussion; but because of the able and earnest argument made in this behalf, we have decided to express our views upon it at greater length. As suggested in the oral argument, there is but little authority directly in point. Under the statute—in this state the whole law of marriage is regulated by the statute—it is provided that marriages may be annulled where a party was incapable of consenting thereto for want of legal age or sufficient understanding, or where the consent of either party is obtained by force or fraud, but then only at the instance of the party laboring under the disability. Bal. Code, § 4477 (P. C. § 6262). There being no statute permitting a parent to maintain an action to annul the marriage of a child in this state, and considering the policy of the law to sustain, rather than abrogate, the marriage relation, we are constrained to hold that the parents cannot maintain their action. We have held the marriage valid. A decree of nullity is entered only upon the theory that a valid marriage never existed. This is in accord with the general rule that a third party cannot maintain an action for the annulment of the marriage. 26 Cyc. 842, 910; *Ridgely v. Ridgely*, 79 Md. 298, 29 Atl. 597, 25 L. R. A. 800; *McKenney v. Clarke*, 2 Swan (Tenn.) 320. While it has been declared in England, under the statute of 43 Eliz. 32, and in some states under similar statutes, that a parent may maintain an action to annul a marriage, yet the fact that the marriage is valid and the right of the parent is not absolute but wholly dependent upon the statute, and that the mere will of the parent cannot avail over the welfare of the infant, is recognized.

“The marriage contracts of infants are not dependent upon the consent of their parents to the marriage, and parents may

not have them annulled upon the ground of their non-consent. It is only the infant wife who may maintain an action to annul her marriage on the ground that it took place without the consent of her father, mother, guardian, or other person having legal charge of her person. Code Civ. Proc., § 1742. Neither an infant husband nor a parent or guardian may maintain such an action, and the reasons therefor are not difficult to discover. The right of a parent to maintain an action for the annulment of the marriage of his infant son or daughter rests solely upon the authority conferred by sections 1744 and 1750 of the Code of Civil Procedure, and the grounds therefor are limited to the fact that one of the parties to the marriage had not attained the age of legal consent, or that the consent of one of the parties was obtained by force, duress, or fraud. But has the parent a right to maintain such an action irrespective of the infant, and without making such infant a party to the action? I think not. The parent's right to maintain such an action is clearly in behalf of the infant, and is in no way dependent upon any right which the parent may possess to control or restrain the marriage. . . . 'All persons having an interest in the subject of the action should be joined as plaintiffs or defendants. The complaint alleges that Glen D. Fero consents to the bringing of the action, and he certainly is united in interest with either the plaintiff or the defendant. If he desires to have the marriage annulled, he is interested in obtaining the judgment demanded; but if, on the other hand, he is satisfied with his marital relations, his interest is adverse to that of the plaintiff. In either case the controversy ought not to be determined until he is brought into the action. The rule contended for by the plaintiff's counsel would permit a parent, guardian, or "any relative" of a party to invalidate a marriage without the consent or knowledge of either of the parties thereto, and, if it were to obtain, might prove subversive to social order, sound policy, and good morals.' [*Fero v. Fero*, 70 N. Y. Supp. 742.]" *Wood v. Baker*, 43 Misc. Rep. 310, 88 N. Y. Supp. 854.

Under the general rule of law, Grover Hollopeter became of lawful age when the marriage ceremony was performed. He is thus entitled to sue in his own name. The ordinary legal consequences follow his marriage, and he is entitled to

Mar. 1909]

Opinion Per FULLERTON, J.

the society and services of his wife. Bishop, Marriage, Divorce and Separation, 557.

The decree of the lower court annulling the marriage is reversed, with instructions to issue the writ prayed for.

RUDKIN, C. J., CROW, MOUNT, and FULLERTON, JJ., concur.

DUNBAR and GOSE, JJ., took no part.

[No. 7253. Decided March 3, 1909.]

KITSAP COUNTY, *Respondent*, v. MARINUS MELKER *et al.*,
Appellants.¹

EMINENT DOMAIN — PROCEEDINGS — COSTS — IMMUNITY OF LANDOWNER—COSTS ON APPEAL. Const. art. 1, § 16, providing that private property shall not be taken or damaged without just compensation having been first made or paid into court, prevents the taxation of costs in condemnation proceedings against the landowner only in the lower court, and does not exempt him from the costs of his appeal to the supreme court, when, under Bal. Code, § 5643, he fails to recover a greater amount of damages on the appeal.

Motion to recall the remittitur and retax costs on appeal. Denied.

James W. Bryan, for appellants.

C. D. Sutton, for respondent.

FULLERTON, J.—The county of Kitsap brought proceedings under the statutes of eminent domain against the appellants to condemn a right of way for a county road across their land. The proceedings were prosecuted to trial and judgment, in which an award was made to the appellants for the land taken and damaged by the establishment of the road. The appellants, not being satisfied with the award as made, appealed to this court, whereupon the judgment was affirmed and

¹Reported in 100 Pac. 150.

the cause remanded. *Kitsap County v. Melker*, 50 Wash. 29, 96 Pac. 695. The costs of the appeal were taxed in this court against the appellants, and they now move that the remittitur be recalled and the costs taxed against the county. The motion is based on § 16 of art. 1 of the state constitution, which reads as follows:

“Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public.”

The contention is that this section not only guarantees to the landowner, whenever his land or any part of it is sought to be taken for a public use, the right to have his damages ascertained in a judicial proceeding and paid into court for him without costs on his part, but that this right to freedom from costs extends to the appellate court, should the landowner take the question to that court, no matter whether or not he receives a more favorable judgment in that court than he was awarded in the court below.

In *Peterson v. Smith*, 6 Wash. 163, 43 Pac. 1050, we held that, under the constitutional provision above cited, a landowner whose land was sought to be appropriated for a county road could remain silent and be assured that before his property is condemned the county would ascertain his damage and

Mar. 1909]

Opinion Per FULLERTON, J.

either pay it to him or into court for his benefit, and that the amount of his damage must be ascertained in a court in a proceeding instituted for that purpose in which he could appear and make his showing of damages if he so desired; holding, further, that a law which required the landowner to present a claim for his damages to road viewers and submit to an ascertainment by them of the amount thereof, or else take the case into the courts himself, was unconstitutional. To the same effect is *Askam v. King County*, 9 Wash. 1, 36 Pac. 1097, which held a drainage law unconstitutional because it did not provide for the ascertainment of the amount to be paid for the property taken and damaged by a proceeding in court except on the initiative of the property owner. In *Snohomish County v. Hayward*, 11 Wash. 429, 39 Pac. 652, a law relating to the construction of public dikes and drains was held unconstitutional for the same reason. So, also, for the same reason, that part of the road law of 1893 (Laws 1893, p. 301), relating to the establishment of county roads was held unconstitutional, in *Seanor v. Board of County Com'rs.*, 13 Wash. 48, 42 Pac. 552.

In 1895 (Laws 1895, p. 82) the legislature, in an act relating to the establishment of county roads, provided that damages to the property taken should be first ascertained by viewers and tendered to the owners; when, if the tender should not be accepted, a proceeding in condemnation should be instituted by the county in the superior court, and if the landowner should fail in such proceeding to recover a judgment for a greater sum than the amount so tendered him, all costs of the condemnation proceedings should be taxed against him. In *Adams County v. Dobschlag*, 19 Wash. 356, 53 Pac. 339, this latter clause was held void, the court saying:

"It was held by this court in *Peterson v. Smith*, 6 Wash. 164, 32 Pac. 1050, that under the constitutional guaranty the owner of the land could not be compelled to present a claim for damages; that he could remain quiet, and be assured that, before his property was condemned, the county must ascertain his damage, and either pay it to him, or pay it into court

for his benefit; and the amount of his damages must be ascertained in a court, in a proceeding instituted for that purpose, and in which the defendant could appear and make his showing, if he so desired. In this case the finding of the commissioners that the damages to the appellants were a certain sum does not meet the requirements of the constitution, as construed in the case above cited. The proceeding instituted for the purpose of determining this damage was the proceeding in the superior court, and not the proceeding before the county commissioners, and the landowner must not be put to the expense of litigation in order to preserve his constitutional right to have the amount of damages determined by a court in a proceeding to which he is a party."

See, also, *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 Pac. 385.

It is manifest, from this long line of cases, that any form of procedure which taxes the costs of condemnation proceedings in the superior courts to the landowner is in violation of the section of the constitution above quoted. But does this right of immunity from costs extend to appeals to the supreme court? We think it does not. We think the condemning party has done its full duty towards the landowner in this respect when it bears the costs of the proceeding in the trial court. To hold otherwise would be to hold that an appeal is a necessity in all condemnation cases, and that any law providing a procedure which does not direct an appeal at the expense of the condemning party would be invalid; for if the costs on an appeal brought by the landowner must be borne by such party, it is because an appeal is a necessary part of the condemnation proceedings; and a law which leaves an appeal optional would be as much in violation of the constitutional provision as is a law which leaves the ascertainment of the damages by a proceeding in the superior court optional. But it is not the intention of the constitution to make an appeal compulsory. It is a right to be exercised by either party at their pleasure, and being so it follows that the costs of the appeal must be borne by that party who is unsuccessful in the appellate court. This, also, is the requirement of the statute. Section 5643 of

Mar. 1909]

Statement of Case.

Bal. Code (P. C. § 5108), provides that the payment into court of the damages assessed and allowed, and of the costs, shall relieve the party condemning from all and any further liability for the property taken, unless upon appeal the owner shall recover a greater amount of damages, "and in that case only for the amount in excess of the sum paid into court, and the costs of appeal."

The motion is denied.

RUDKIN, C. J., CHADWICK, MOUNT, CROW, GOSE, and DUNBAR, JJ., concur.

[No. 7401. Decided March 3, 1909.]

MARCELLUS LARA, *Appellant*, v. FRANK F. SANDELL *et al.*,
Respondents.¹

LIMITATION OF ACTIONS—COMMENCEMENT OF ACTIONS—STATUTES—CONSTRUCTION. An action is commenced at the time the complaint is filed, within the provisions of our statute of limitations.

SAME—PAYMENT OF TAXES—PREREQUISITES. Under Bal. Code, § 5503, the prerequisites to obtain title by adverse possession and payment of taxes are, (1) claim and color of title made in good faith, (2) actual notorious possession for seven successive years, and (3) payment of all taxes assessed during that time.

SAME—COLOR OF TITLE. A void tax deed is sufficient color of title under the seven years statute of limitations with payment of taxes.

SAME—PAYMENT OF TAXES—TIME OF PAYMENT. Bal. Code, § 5503, giving title by adverse possession for seven years, with payment of all taxes "during said time," does not require the lapse of seven years after the first payment of taxes, but only the payment of all taxes assessed during the period of adverse possession.

Appeal from a judgment of the superior court for King county, Griffin, J., entered November 7, 1907, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to set aside a tax sale and recover possession of real property. Affirmed.

Samuel S. Langland, for appellant.

Peters & Powell, for respondents.

¹Reported in 100 Pac. 166.

RUDKIN, C. J.—This action was instituted to recover possession of certain real property in the city of Seattle, and to set aside a tax sale and tax deed. The property was sold by the treasurer of King county on the 12th day of September, 1896, for delinquent taxes for the year 1892, and the defendants became the purchasers at the tax sale. On the 21st day of November, 1899, no redemption from the tax sale having been made, the treasurer issued his deed to the purchasers. The plaintiff in this action claims title under mesne conveyances from the record owners, while the defendants claim title under their tax deed, accompanied by adverse possession and the payment of taxes for the statutory period. The court made findings of fact and conclusions of law in favor of the defendants, and entered judgment accordingly. From this judgment the plaintiff has appealed.

The appellant assails the regularity and validity of the proceedings leading up to the tax sale, and the sufficiency and validity of the notice of intention to apply for a tax deed; but the conclusion we have reached as to one of the defenses interposed by the respondents renders a consideration of other questions unnecessary. The complaint in the action was filed on December 31, 1906, and under repeated rulings of this court that date marked the commencement of the action in so far as the statute of limitations or adverse possession is concerned. *Blalock v. Condon*, 51 Wash. 604, 99 Pac. 733, and cases there cited.

The court below made the following findings, among others:

“(9) That the plaintiff’s complaint was filed in this cause on the 31st day of December, 1906.

“(10) That from September 26, 1896, up to November 21, 1899, the above described premises were vacant and unoccupied.

“(11) That the defendants have been continuously from (about) the 21st day of November, 1899, down to the present time, in the actual, open, notorious, exclusive and continuous possession of the above described property under claim of title based upon their certificate of tax sale of September 12,

Mar. 1909]

Opinion Per RUDKIN, C. J.

1896, and subsequently upon their tax deed of November 21, 1899.

"(12) That the said defendants upon said tax sale and purchase paid all the taxes levied upon said property from the year 1892 to the year 1896, both inclusive, and have ever since paid all the taxes assessed and levied thereon, said payment being made under claim and color of title."

These findings are fully sustained by the testimony, and would seem to bring the case within the provisions of Bal. Code, § 5503 (P. C. § 1160), which reads as follows:

"Every person in actual, open and notorious possession of lands or tenements under claim and color of title, made in good faith, and who shall for seven successive years continue in possession and shall also during said time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title."

The necessary prerequisites under this section are: (1) Claim and color of title made in good faith; (2) actual, open and notorious possession continued for seven successive years; and (3) payment of all taxes legally assessed during that time. Whatever the rule may be in other jurisdictions, it is firmly established in this state that a void tax deed may constitute a sufficient basis for the running of the statute of limitations. *Hamilton v. Witner*, 50 Wash. 689, 97 Pac. 1084, and cases cited. And we think it clearly appears from the record before us that the respondents were in actual, open, and notorious possession of the lands in controversy, under claim and color of title made in good faith, and that such possession continued for upwards of seven successive years prior to the commencement of the present action.

The appellant contends, however, that the three prerequisites we have mentioned must exist concurrently without interruption, and must continue throughout the entire seven-year period, and that it does not appear that seven years elapsed between the date of the first payment of taxes, under

claim and color of title made in good faith, and the commencement of this action. This contention is based largely on decisions of the supreme court of Illinois, and it must be conceded that under the decisions of that court the period of adverse possession does not commence to run until a tax payment has been made. *Glos v. Wheeler*, 229 Ill. 272, 82 N. E. 234.

This court followed the Illinois cases in *Tremmel v. Mess*, 46 Wash. 137, 89 Pac. 487, in construing Bal. Code, §5504 (P. C. § 1161), which relates to vacant and unoccupied lands; but under that section it is quite manifest that the statute of limitations or adverse possession cannot commence to run until there has been a payment of taxes, for there is nothing else to mark the commencement of the statutory period. It seems to us that this rule should not apply in construing Bal. Code, § 5503 (P. C. § 1160). The only requirement of the latter section is that the adverse possession shall be continued for seven years, and that the occupant shall pay all taxes legally assessed during that time. To hold that seven years of adverse possession is not complete until seven years have elapsed after the first payment of taxes under claim and color of title made in good faith, is to add materially to the language of the statute. The supreme court of California has held, under a similar statute, that the occupant need only pay the taxes legally assessed during the statutory period of adverse possession, and we think this construction is in entire harmony with the language of the statute, and should be adopted here. *Brown v. Clark*, 89 Cal. 196, 26 Pac. 801; *Allen v. McKay*, 120 Cal. 332, 52 Pac. 828.

We are therefore of the opinion that the defense of adverse possession under claim and color of title made in good faith, accompanied by the payment of all taxes legally assessed, was fully made out, and the judgment is affirmed.

FULLERTON, CHADWICK, MOUNT, CROW, GOSE, and DUNBAR, JJ., concur.

Mar. 1909]

Opinion Per RUDKIN, C. J.

[No. 7679. Decided March 8, 1909.]

SEABURY MERRITT, *Appellant*, v. NORRIS N. GRAVES,
Respondent.¹

EXECUTION SALES—SETTING ASIDE—GROUNDS—IRREGULARITY — INADEQUACY OF BID. The fact that a higher bid is submitted after sale of lands on execution is not ground for refusing to confirm the sale, under Laws 1899, p. 88, § 6, subd. 2, requiring a confirmation unless there appear "substantial irregularities in the proceedings concerning the sale, to the probable loss or injury of the party objecting."

SAME—NOTICE OF SALE TO DEFENDANT. Parties to an action are not entitled to personal notice of the time and place of an execution sale, under Laws 1899, p. 86, § 3.

SAME—PARTIES ENTITLED TO PURCHASE—ATTORNEY FOR PLAINTIFF. The attorney of the execution plaintiff may become the purchaser of lands at execution sale, the plaintiff not objecting, and the execution debtor cannot object to confirmation of the sale on that ground.

Appeal from an order of the superior court for Spokane county, Sullivan, J., entered September 1, 1908, setting aside a sale on execution, on motion of the defendant. Reversed.

C. C. Lantry, for appellant.

A. E. Barnes, for respondent.

RUDKIN, C. J.—This case was before this court on a former appeal. *Graves v. Graves*, 48 Wash. 664, 94 Pac. 481. The judgment was there reversed, and the cause remanded with directions to make an equal division of the property in controversy between the plaintiff and the defendant, or to sell the property and divide the proceeds in case a division could not be made. After the case was remitted to the court below, judgment was entered pursuant to the mandate of this court and referees were appointed to partition the property. The referees thus appointed reported to the court that the property could not be partitioned without great prejudice to the owners and parties in interest, and recommended that the property be sold and the proceeds

¹Reported in 100 Pac. 164.

divided. This report was confirmed after a hearing, and the referees were ordered to make a sale of the property, at public auction, to the highest bidder, in the manner required for the sale of real property on execution. The property was sold pursuant to this order, and the appellant Merritt became the purchaser at the sale. The sale was reported to the court for confirmation, and the respondent, who was the defendant in the original action, interposed the following objections thereto:

"(1) That the defendant had no notice of the time of sale and had no opportunity to be present and protect his interests in said property and did not know of said sale until it was over.

"(2) That the property was sold for an inadequate price.

"(3) That in case of a resale of said property it will sell for a substantial increase of the price bid at said sale.

"(4) The defendant herein tenders a bid of \$4,500, for said lots.

"(5) The defendant hereby tenders into court a check for \$100, to pay the costs of a resale of said property, and agrees to make good any additional amount if that sum is not sufficient to meet the costs of resale.

"(6) The defendant hereby offers to pay into court the sum of \$2,300 for the use of the plaintiff for her half interest in said lots."

A hearing was had on the motion to confirm and the objections thereto, and the court refused to confirm the sale and ordered a resale for two reasons; first, because a higher and better bid was submitted with the objections to confirmation; and second, because the attorney for the plaintiff in the action was the purchaser at the sale. From the order setting aside the sale and ordering a resale, this appeal is prosecuted.

The statute of this state relating to partition proceedings provides that,

"All sales of real property made by referees shall be made by public auction, to the highest bidder, in the manner required for the sale of real property on execution." Bal. Code, § 5583 (P. C. § 1228).

Mar. 1909]

Opinion Per RUDKIN, C. J.

The statute relating to sales of real property on execution provides that if objections to confirmation be filed,

"The court shall, notwithstanding, allow the order confirming the sale, unless on the hearing of the motion, it shall satisfactorily appear that there were substantial irregularities in the proceedings concerning the sale, to the probable loss or injury of the party objecting." Laws 1899, p. 88, subd. 2 of § 6.

The fact that a higher or better bid is submitted after sale is not a statutory ground for setting aside or refusing confirmation of an execution sale. There must be some irregularity in the proceedings concerning the sale itself.

"An irregularity is defined to be the want of adherence to some prescribed rule or mode of proceeding; and it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unseasonable time or improper manner." Vol. 4 Words & Phrases; Title, Irregularity, and cases cited.

It is a departure from some prescribed rule or regulation, and within this definition the objections to confirmation failed to point out a single irregularity in the proceedings concerning the sale, unless the fact that the property was bid in by the attorney for the adverse party be deemed an irregularity. The fact that a higher or better bid was submitted after the sale did not show any irregularity in the proceedings concerning the sale, and the parties to the action were not entitled to personal notice of the time and place of sale. Laws 1899, p. 86, § 3. Can the respondent be heard to complain because the property was bid in by the attorney for the adverse party? In general,

"No person can become a purchaser at a judicial sale who has a duty to perform in reference thereto which is inconsistent with the character of purchaser, or who is so connected with the sale that his individual interest as a purchaser might be inconsistent with his duty. Thus the person who sells at a judicial sale may not become the purchaser, either directly or indirectly. Neither can the judge who ordered

the sale become the purchaser or be interested as a purchaser; and under some statutes an appraiser of the property sold is prohibited from becoming the purchaser. However, a purchase by a prohibited person renders the sale not void, but voidable only. In the United States either party to the suit may become the purchaser, and if a judicial sale of corporate property occurs in the course of litigation between stockholders, they stand in no such fiduciary relation to the property as to prevent them from becoming purchasers either for themselves or for others. But an attorney who becomes a purchaser at a judicial sale made for the benefit of his client is not a *bona fide* purchaser without notice. In England and Canada neither a party to the suit nor his solicitor can become the purchaser unless he has previously obtained leave of court to bid." 24 Cyc. 29.

But the prohibition in question has no application to a case of this kind. The appellant was the attorney for the plaintiff in the original action, but she has not appealed and is not complaining. No relation of trust or confidence existed between the appellant and the respondent, and the appellant was under no legal or moral obligation to protect him or his rights. The plaintiff in the action might have become the purchaser at the sale. *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. Ed. 732, and if so, why not her attorney? True, the attorney occupied a position of trust and confidence towards his client and could not become the purchaser at the sale against her will; if she did not consent to the purchase, she might by acting promptly claim the benefit of the purchase or oppose confirmation, but the matter was one solely between her and her attorney, and a stranger will not be heard to complain. We are of opinion, therefore, that no irregularity in the proceedings concerning the sale was shown, and that the order setting the sale aside and directing a resale should be reversed with directions to confirm the sale as prayed. It is so ordered.

GOSE, CHADWICK, CROW, MOUNT, DUNBAR, and FULLERTON, JJ., concur.

Mar. 1909]

Opinion Per CHADWICK, J.

[No. 7455. Decided March 3, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v. WILLIAM STEWART, *Appellant*.¹

RAPE—EVIDENCE—COMPLAINT MADE BY PROSECUTRIX—CORROBORATION CONNECTING DEFENDANT WITH CRIME. Evidence of complaint made by the prosecutrix, soon after a rape, is admissible only as corroborative proof that the complainant was raped, and it is not such corroboration as "tends to convict the defendant of the commission of the offense," within the requirement of Laws 1907, p. 396; since some substantial fact or circumstance independent of the statement of the prosecutrix is required.

SAME—INSTRUCTIONS. An instruction which singles out and makes prominent the complaint made by the prosecutrix, without qualification or explanation of its character as evidence, as a "corroborating circumstance, tending to support her testimony . . . relating to the alleged crime of rape having been committed upon her," is prejudicial error tending to mislead the jury into finding therefrom corroboration tending to connect the defendant with the crime (FULLETON and DUNBAR, JJ., dissenting).

STATUTES—RULE OF CONSTRUCTION. In construing a statute, the courts must look to the old law, the mischief and the remedy.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered October 16, 1907, upon a trial and conviction of rape. Reversed.

F. C. Robertson and Slater & Allen, for appellant.

J. A. Rochford, for respondent.

CHADWICK, J.—After instructing the jury generally, and particularly calling its attention to the law of 1907, page 396, wherein it is declared that "no conviction shall be had for the offense of rape, or seduction, in this state upon the testimony of the female raped, or seduced, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense," the court gave the following instruction:

"If the jury find from the evidence beyond a reasonable doubt that the complaining witness made complaint of the

¹Reported in 100 Pac. 153.

alleged commission of the offense charged in the information to another, at the earliest opportunity, and immediately after the time of the alleged commission of the offense charged; then such complaint, if any such appears in evidence, is a corroborating circumstance, tending to support her testimony, if any she has given, relating to the alleged crime of rape having been committed upon her, at the time and place alleged in the information; and the court instructs you that such complaint, if any such complaint you find from the evidence, is a circumstance which the jury should take into consideration with all other facts and circumstances in the case, as shown by the evidence, in determining the question whether a rape at the time and place charged in the information was, in fact, committed upon the complaining witness."

Error is predicated upon the giving of this instruction.

The principal and only affirmative defense offered by appellant was that of an alibi. The purpose of the statute was to prevent the conviction of a person charged with the crime of rape or seduction, upon the testimony of the woman, without evidence of some fact or circumstance coming from a source independent of her—in other words, to prevent a prosecutrix from corroborating herself. This is made apparent by reference to the act. It in terms requires other evidence, not of the act of rape, for from the nature of the crime that would generally be impossible, but of some material fact or circumstance tending to convict the person charged. It cannot be that it was the intent of the legislature to provide that, if a prosecutrix, within a reasonable time after the offense was committed, made complaint to another, it was a matter of corroboration within the meaning of the law. If so, no purpose was served by its enactment. It has always been the rule that evidence of complaint made soon after the outrage was perpetrated could be received either as original evidence or to sustain the evidence of the prosecutrix if impeached. This subject is fully treated and authorities collected by the following text-writers: 1 Greenleaf, Evidence (16th ed.), 162h, 469c; Wharton, Criminal Evidence (9th ed.), § 273; 4 Elliott, Evidence, § 3102; 1 McClain,

Mar. 1909]

Opinion Per CHADWICK, J.

Criminal Law, § 456; 10 Ency. Evidence, 600; Wigmore, Evidence, 1134-1140. The rule has also been declared in this state: *State v. Hunter*, 18 Wash. 670, 52 Pac. 247; *State v. Griffin*, 43 Wash. 591, 86 Pac. 951.

In the case last cited, the purpose of such testimony and extent of its application are fully discussed. It is settled by the great weight of authority that such evidence is received, whether upon the one theory or the other, only as corroborative proof that the complainant was in fact raped. Confusion has arisen from the fact that courts and law writers have sometimes failed to differentiate between corroborative evidence in its broad sense and the mere confirmation of the testimony of a prosecutrix by reproducing her story at a time when, as the law presumes, instinctive and spontaneous utterance of bodily and mental anguish prompts the pronouncement of truth. The one is evidence of substantive facts independent of the prosecutrix, which tend in some degree to support her testimony. The other is evidence in corroboration of her testimony, and merely affecting her credibility as a witness.

The words "corroborating evidence," as used in these statutes, has been defined by Keith, P., in the case of *Mills v. Commonwealth*, 93 Va. 815, 22 S. E. 863, to be "evidence which does not emanate from the mouth of the seduced female; that it must not rest upon her credibility, but must be such evidence as adds to, strengthens, confirms and corroborates her." It may be laid down as a general rule that corroboration in this connection means testimony of some substantive fact or circumstance independent of the statement of the prosecutrix. It may be either direct or circumstantial, and however slight it must tend to connect the defendant with the crime. *State v. Jones*, 48 Wash. 133, 92 Pac. 899. Corroboration of the testimony of the witness is not sufficient. Corroboration of the fact in dispute is essential. A person may be convicted without the one, if the testimony be otherwise sufficient. He cannot be convicted if the other is lacking, how-

ever credible the testimony of the prosecuting witness may be.

To single out and make prominent, by way of separate instruction, the complaint of the prosecutrix that she had been the victim of a rape, without qualification and proper explanation of its character as evidence, was calculated to mislead the jury into the belief that it, being a matter of corroboration and so styled by the trial judge, was such corroboration as is referred to in the statute, and sufficient in itself to meet the requirements thereof. A complaint to a third party is neither a positive fact nor a circumstance tending to convict a party charged, within the meaning of the law. The fact of complaint was not denied. The independent evidence from which corroboration might have been found in this case was conflicting, and the jury may have honestly disagreed as to all of it, and still under the instruction complained of found the verdict in this case. The prosecutrix had testified that appellant had ravished her. The jury would naturally seize upon the only undisputed fact in the case as corroboration, when told by the court that it was a corroborating circumstance tending to support her testimony. The statute of 1907 creates a rule of evidence and makes it the law of the case. The court must fully and clearly instruct the jury upon the material question of law involved, although there be in fact corroborating circumstances. *State v. Carnagy*, 106 Iowa 483, 76 N. W. 805.

It is a familiar canon of the law that, in the construction of a statute, courts will look to the old law, the mischief, and the remedy. Under the old law the instruction complained of was proper. The mischief lay in the fact that convictions might be had upon the uncorroborated testimony of the prosecutrix. To meet this the legislature framed a new rule, and by so doing put upon the courts the duty of qualifying the rule which, by reason of its application, induced the new enactment. The court should have safeguarded the constitutional and legal rights of appellant by saying that corroboration arising from a timely complaint could not be taken

Mar. 1909] Dissenting Opinion Per FULLERTON, J.

as corroboration tending to support the evidence of the prosecutrix in the particular that appellant was the guilty person.

The judgment of the lower court is reversed and a new trial ordered.

RUDKIN, C. J., MOUNT, CROW, and GOSE, JJ., concur.

FULLERTON, J. (dissenting)—I am unable to concur in the ruling made in this case. In the opinion of the majority it is assumed that the court, in that portion of the charge to the jury quoted therein, instructed them to the effect that, if they found that the prosecuting witness made complaint to another of the commission of the offense upon her at the earliest opportunity and immediately after the time the offense was committed, such complaint was a corroborating circumstance tending to show that the accused was the person who committed the rape. In my opinion the instruction quoted does not in the remotest degree bear this construction. It is a plain charge to the effect that proof of such complaint is corroborative evidence of the fact that the prosecuting witness has been raped; nothing more. And that such an instruction is sound law is conceded in the majority opinion itself. As therein stated, "It has always been the rule that evidence of complaint made soon after the outrage was perpetrated could be received either as original evidence, or to sustain the evidence of the prosecutrix if impeached;" and that, "It is settled by the great weight of authority that such evidence is received . . . as corroborative proof that the complainant was in fact raped." This being true, there was no error in the charge of the court, as it did no more than give the evidence that effect.

But it is said further in this connection that the court should have charged the jury that corroboration arising from timely complaint could not be taken as corroboration tending to support the evidence of the prosecutrix in the particular that the appellant was the guilty person. Had a

request been made for such an instruction, then unquestionably the court should have given it. But in this state mere nondirection, either partial or total, is not ground for a new trial. A party cannot, by excepting to a charge, make it the foundation for an assignment of error, merely because it is indefinite and incomplete. Counsel owe the duty to the court, in criminal as well as in civil cases, not to mislead it either by silence, artifice, or fraud. It is counsel's duty, therefore, to call to the attention of the court any omission he may deem material in the court's charge, and failure to do so is a waiver of the right to assign error upon it. *State v. Parsons*, 44 Wash. 299, 87 Pac. 349.

In my opinion the judgment should be affirmed.

DUNBAR, J., concurs with FULLERTON, J.

[No. 7674. Decided March 3, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v. HOWARD CRAIG,
Appellant.¹

APPEAL—DISMISSAL—TIME FOR MOTION. A motion to dismiss an appeal because of imperfections in the record comes too late, where after an oral argument, with the records before him, respondent's counsel had asked leave to file a brief and stipulated that a reply brief could be filed, and in his brief submitted the motion to dismiss.

CRIMINAL LAW—DEFENSES—INSANITY—INSTRUCTIONS—CONTRADICTION AND MISLEADING INSTRUCTIONS—PARTIAL INSANITY. Upon the defense of insanity, an instruction is contradictory and misleading where the jury is told that the defendant would not be accountable for his crime if he was suffering from mental disease so complete that every faculty and power of his mind was affected by it, and that in consequence he was not capable of a single sound, healthy mental action, although other instructions favorable to the defendant were given; since it denies to him the defense of partial insanity.

SAME—DEFENSE OF INSANITY—INSTRUCTIONS. The jury should be instructed that the test of defendant's sanity is whether he had sufficient capacity at the time to distinguish between right and wrong with reference to the act charged.

¹Reported in 100 Pac. 167.

Mar. 1909]

Opinion Per CHADWICK, J.

CRIMINAL LAW—EVIDENCE—INSANITY—NONEPERT OPINION. The testimony of nonexpert witnesses is competent to show insanity.

SAME—DEFENSE OF INSANITY—INSTRUCTIONS. Upon the defense of insanity, the power to choose between right and wrong being a relative question of fact to be determined by the jury, any instruction that invites the jury to go further than to answer the question, Had the accused sufficient capacity at the time to distinguish between right and wrong with reference to the act committed? or that leads the jury into unknown paths, is prejudicially erroneous, even though involved instructions may be regarded as more favorable to the accused than those requested; since he was *non compos mentis* and entitled to the protection of the law if he did not have the mental power to choose between right and wrong with reference to the act charged, and if such affection was the efficient cause of the act.

SAME—DEFENSE OF INSANITY—BURDEN OF PROOF—INSTRUCTIONS. Upon the defense of insanity it is proper to refuse to instruct that if the defendant's evidence raises a reasonable doubt as to his sanity, the state must remove the doubt by the preponderance of the evidence.

SAME—EVIDENCE—HEARSAY. It is inadmissible, as hearsay, for a prosecutrix to testify that a third person told her that the accused had said he would not continue relations with her.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered March 20, 1908, upon a trial and conviction of a felony. Reversed.

Geo. A. Latimer and *Fred Miller*, for appellant.

R. M. Barnhart, *Fred C. Pugh*, and *J. Stanley Webster*, for respondent.

CHADWICK, J.—When this case was called for argument on December 15, 1908, no briefs had been filed by the respondent. The prosecuting attorney of Spokane county appeared, and after oral argument, asked leave of the court to file a printed brief. It was then stipulated that a reply brief might be filed. The record was before counsel at that time. The prosecuting attorney filed a brief, and before entering into an argument on the merits, submitted a motion to dismiss the appeal because of the imperfections of the record. Without entering into either inquiry or discussion

of the points raised, we decide that the motion came too late, and that this case should be decided upon its merits.

Appellant was convicted of a felony, in the superior court of Spokane county. He set up the defense of insanity, and offered testimony on the trial to sustain his plea. The court gave the following instruction:

"You will see, therefore, that if you believe from the evidence in this case that the defendant was insane and that he committed the crime with which he is charged that he may or may not be legally accountable for such crime. If you should find that the defendant at the time the act was committed was suffering from mental disease so complete that every faculty and power of his mind were affected by it and that in consequence the defendant was incapable of a single healthy mental action, then such crime would be the product of an insane mind and the defendant could not be held accountable therefor. On the other hand, if you should find that, at the time the act was committed, the defendant was suffering from partial mental disease, so that he was capable of at least some sound, healthy mental action, then he would or would not be accountable, depending upon whether the act was the product of a sound mental action. If you should find that the defendant committed this crime and that it was the direct product and offspring of diseased mental action, then the defendant could not be held legally accountable therefor. But, on the other hand, if you should find that even though the defendant was suffering with partial mental disease, yet that he was capable of some sound mental action, and that the crime was the outgrowth, the result, the offspring of such sound mental action, then he would be accountable therefor."

Exceptions were duly reserved by appellant, and it is insisted that the court erred in its conception of the law of insanity, when invoked as a defense to crime. It is the privilege of one charged with crime to have the jury instructed upon his theory of defense, in plain and concise language. The instruction complained of is contradictory, inconsistent with itself, and misleading to the jury. The objectionable part of the instruction lies in this: The jury is told that, if

Mar. 1909]

Opinion Per CHADWICK, J.

it finds defendant was suffering from mental disease so complete that every faculty and power of his mind was affected by it, and that in consequence the defendant was not capable of a single, sound, healthy mental action, then defendant could not be held accountable for his crime. The remainder of the instruction may be favorable to appellant, but we are not called upon to deal with the subject as a purely abstract proposition. The court was assuming to instruct the jury upon a defense technical in so far as the layman is concerned, and the fact that the jury may have been misled by the improper part of the instruction is sufficient to warrant a reversal of this cause.

The court's instruction is calculated to draw the minds of the jury entirely away from a consideration of the relation of the mental condition of the appellant to the particular thing charged against him. It denies the benefit of the defense of monomania, which may be and usually is the defense set up when insanity is relied upon. A person may be partially insane on all subjects, and yet be criminally responsible if he have sufficient capacity to distinguish right from wrong with reference to the crime committed. On the other hand, he may be mentally sound upon almost all subjects, with power of rational thought and capacity to meet the ordinary affairs of life; and yet upon some one or a particular group of subjects manifest a mental excitement, either of desire or aversion, that makes him wholly irresponsible within the limit of his aberration.

Confusion has resulted from the failure of some courts to distinguish between partial insanity in the sense of weakened or disordered intellect generally, and partial insanity in the sense of monomania. While the subjects of inquiry suggested by the instruction given afford an inviting field for the talent and theory of the alienist, so far as the law is concerned the test is a simple one, and is sustained by authority without number. "Had the accused sufficient capacity at the time of committing the act to distinguish between right and

wrong with reference to the act complained of?" is the general rule adopted by the courts. Clevenger, *Insanity*, p. 165. The authorities on this subject are too numerous for present citation. They are collected and the principles stated in 12 Cyc. 164; 21 Cyc. 663; 22 Cyc. 1212; 16 Am. & Eng. Ency. Law (2d ed.), 619-621.

Counsel for the state cite *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533; *Parsons v. State*, 81 Ala. 577, 2 South 854, 60 Am. Rep. 193, to sustain the trial court, but do not contend, either in oral argument or in their brief, that the instruction complained of was proper. They say:

"Respondent does not contend that the foregoing is the true measure of criminal responsibility applicable to the defense of insanity. The better rule, we think, is that announced by the English judges in the historic *McNaghten* case and approved by a majority of the courts and text writers of this country to-day, but we do take issue with appellant upon his claim of prejudice. If the giving of the instruction complained of was error, it was error without prejudice, because the instruction given was more favorable to the appellant than the instructions requested by his counsel."

We cannot subscribe to this test. Without going into the merits of the requested instructions, it is enough to say that, while the court could refuse to give the instructions requested, he was nevertheless bound to instruct the law of the case. The talent of counsel is not an issue here; the instruction given to the jury is. It is not only confusing, but it injects issues and directs inquiries on the part of the jury that should have no place in a criminal trial. This is practically conceded by counsel for the state:

"The point we make is this: The doctrine of the *Pike* and *Parsons* cases embodied in the court's charge to the jury is clearly an extension of the rule stated by Clevenger and maintained by counsel because, (1) it included irresistible impulse and authorized the jury to acquit the defendant, even though he knew the act was wrong, if by reason of mental disease he was irresistibly compelled to commit it; (2) it substituted the medical test instead of the legal test, and

Mar. 1909]

Opinion Per CHADWICK, J.

authorized the jury to acquit the defendant if the act 'was the direct product of diseased mental action,' without regard to the degree to which the disease had progressed, or the extent to which it had deprived him of knowledge of the nature and quality of his act."

It is for these very reasons that we think this case should be reversed. Appellant did not rely upon irresistible impulse as a defense; it was not before the lower court and is not before us. When a jury of laymen are invited to go further than to answer the question. Had the accused sufficient capacity at the time of committing the act to distinguish between right and wrong with reference to it, they are invited to enter the realm of speculation where even the opinion of the alienist is met by like opinion, and he can find no guide to clear his doubt or direct him toward a truthful verdict.

By the exercise of some ingenuity, a part of the instruction complained of might be extracted from the *Pike* case. That case is a long and somewhat abstruse attempt to qualify the general rule. It, in any event, could have no possible application in this state, for the conclusion of the court is based upon the proposition that the testimony of nonexpert witnesses will not be received to show insanity, and that, when the experts who "knew all that was known on the subject" had expressed an opinion that a man was insane, that fact was fixed, and the court, who was "profoundly ignorant of mental disease," should refrain from submitting to the jury the question of the capacity of the defendant to distinguish between right and wrong with reference to the particular act. In this state the testimony of nonexpert witnesses is competent to show insanity. *State v. Brooks*, 4 Wash. 328, 30 Pac. 147; *Clum v. Barkley*, 20 Wash. 103, 54 Pac. 962; *In re Gorkow's Estate*, 20 Wash. 563, 56 Pac. 385; *Higgins v. Nethery*, 30 Wash. 239, 70 Pac. 489. Hence the force of this authority is destroyed. The *Parsons* case does not, in fact, deny the general rule. The judge writing the opinion

raises a fanciful rather than a real question, whether there may not be "insane persons of a diseased brain who, while capable of perceiving the difference between right and wrong are as a matter of fact so far under the duress of such disease as to destroy the power to choose between right and wrong." The proposition is elaborately discussed, but it would seem that the learned judge could have disposed of it by saying that, insanity being a question of fact, whenever it appeared from all the evidence bearing on the question that a person charged with crime did not have the mental power to choose between right and wrong with reference to the particular act charged, he was of unsound mind, and if such affection was the efficient cause of the act and if he would not have committed the act but for that affection, he should be acquitted; for one with such mind is *non compos mentis* and entitled to the protection of the law. The power to choose must follow a sane knowledge, and power to distinguish is not a creature of its own creation—an abstract theorem to vex the mind, but must be intelligently determined, as a relative question of fact, by the jury.

The doctrine of the cases relied on by the state to sustain the instruction complained of, while having the sanction of one so learned as Mr. Wharton, would bar the trial of the question of insanity in a criminal proceeding, for no judge could get the exact question to be determined before the jury; for if, as he says and as Justice Doe says in the *Pike* case, the courts are adhering to the exploded medical theories of two centuries ago, while science has advanced, his observation that it is "not the business of courts to decide scientific questions; such evidence they must take from experts in science," is well taken. Wharton, Medical Jurisp. 554.

If, in fact, these cases voice an imperfection in the law—a condition which we do not admit, no harm can result to the state or to the accused. Although a person may be convicted upon the one theory, if he became sane and, in the opinion of the physician in charge of the criminal insane, a safe

Mar. 1909]

Opinion Per CHADWICK, J.

person to be at large, he may be discharged under § 6, act 1907, p. 33, or by writ of *habeas corpus* avail himself of the opinion of the alienist. On the other hand, under § 10 of the act, notwithstanding an acquittal, the state may subject him to the so-called scientific test, and if then insane, procure his commitment. In so far, then, as we are concerned, whether insanity be a question of science or of law, there should be no objection to the keeping of the law in the law courts, leaving science in control of its undisputed field.

The trial judge in the famous case of *Guiteau* was invited to leave the defined channels and enter a sea of confusion, but reduced the legal proposition now before us to the following:

"The instructions that have been given you impart in substance that the true test of criminal responsibility, where the defense of insanity is interposed, is whether the accused had sufficient use of his reason to understand the nature of the act with which he is charged, and to understand that it was wrong for him to commit it." *Guiteau's Case*, 10 Fed. 161.

The danger of departure from established precedent is well stated by Justice Stone in a dissenting opinion in the *Parsons* case:

"Judicial administration is too real to enter upon such doubtful and dangerous speculations. In the language of Judge Curtis, 'It searches after those practical rules which may be administered without inhumanity, for the security of civil society by protecting it from crime. It inquires not into the peculiar constitution of mind of the accused, or what weakness, or even disorders he was afflicted with, but solely whether he was capable of having, and did have a criminal intent.' I hold we should take our steps cautiously, in adopting the theories of psychological enthusiasts, lest we disarm retributive justice of all its restraining energy. . . . I regret what I conceived to be a duty to express my views so much at length. On a question of less importance I would not have done so. I have feared, however, and still fear, that the effect of their ruling will be to let in many of the evils which result from allowing the defense of emotional insanity. I acquit them of all intention to alter the rule of this court

on that subject. Still, I think the line cannot be too clearly and sharply drawn, which separates the pitiable, unfortunate victims of diseased mental faculties, from the recklessly depraved, whose chief evidence of insanity is found in the causeless atrocity of their crimes. Human life has become all too cheap; and while we spread the mantle of mercy over the criminally irresponsible, the lawless should be made to feel that the way of the transgressor is hard. The terror of the law may thus become a minister of peace."

Those who invoke this defense are amply favored by the law, and we cannot indorse a doctrine that would lead the jury into unknown paths and make convictions well nigh impossible where the defense of insanity is interposed. Complexity of expert opinion, coupled with involved instructions by the court, has made the defense of insanity most effective to those whose mania begins and ends with the fatal blow, a condition possible in all such cases unless the court by its instructions fixes the minds of the jury upon the concrete question of fact to be decided by it.

Error is also predicated upon the refusal of the court to instruct the jury that if the evidence offered by appellant raises a reasonable doubt as to his sanity, the state must remove the doubt by a preponderance of the evidence. This request was properly refused under the authority of *State v. Clark*, 34 Wash. 485, 76 Pac. 98, 101 Am. St. 1006. The prosecuting witness was permitted to state in chief, over the objection of appellant, that one Cushman had come to her room at the instance of appellant and told her that appellant was not coming to her room any more, and that he (Cushman) had returned later and stayed all night with her. This was hearsay of the most dangerous character, and should have been excluded by the court. After the unchastity of a prosecuting witness is shown, in order to affect her credibility, it would not be improper to permit her to show that the party on trial was the cause of her undoing, but this cannot be done with hearsay evidence.

We find no merit in the other errors assigned by counsel.

Mar. 1909]

Opinion Per CHADWICK, J.

The judgment of the lower court is reversed, and this cause remanded for a new trial.

RUDKIN, C. J., FULLERTON, MOUNT, and DUNBAR, JJ.,
concur.

[No. 7755. Decided March 8, 1909.]

F. H. BALDIE, *Appellant*, v. TACOMA RAILWAY & POWER
COMPANY, *Respondent*.¹

STREET RAILWAYS—COLLISION WITH AUTOMOBILE—DRIVING ON TRACK—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. It is not contributory negligence, as a matter of law, for the driver of an automobile, who was run into from behind by a street car, to drive his machine on the street car tracks, without looking back, where it appears that he had a red rear light, the night was dark and foggy, and there was danger of striking people on the crossings, and one of the cross streets was torn out and could be crossed only over the street car tracks, and there was evidence that the street car was running at a dangerous rate of speed and sounding no alarm at the time of the collision.

SAME—STREETS—RIGHT OF WAY—NEGLIGENCE—QUESTION FOR JURY. In such a case, the street car does not have the right of way, as a matter of law, and it is for the jury to determine whether the motorman was guilty of negligence in not seeing the automobile in time to avoid an accident.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered October 26, 1908, upon defendant's motion for a nonsuit, after a trial before a jury, dismissing an action for damages to an automobile run into by a street car. Reversed.

H. M. Owens and Bates, Peer & Peterson, for appellant.

Grosscup & Morrow, for respondent.

CHADWICK, J.—This action was brought by plaintiff to recover damages for injuries to an automobile, alleged to have been the result of the careless and negligent operation

¹Reported in 100 Pac. 162.

of one of defendant's street cars in the city of Tacoma. At about the hour of midnight of November 7, 1907, the automobile, driven by a chauffeur, was run onto Tacoma avenue from a side street, and was proceeding in a southerly direction at a speed of about ten or twelve miles an hour. After the automobile had been run a distance of three or four blocks and was within about twenty feet of a street crossing, the car crashed into the rear end of the machine, causing the damage for which recovery is now sought. A dense fog was hanging over the city. The automobile was equipped with two white headlights, turned low, and a red rear light. It was also equipped with a Gabriel horn, which was blown at frequent intervals. The place of the accident was near the end of the car line. The automobile passed the car while it was standing at the terminus and passengers were alighting. At that time the headlight on the car was showing to the north. After passing the car, the driver ran his automobile over and partly onto the street car track, and as we have said, had proceeded between three and four blocks in a southerly direction when overtaken by the street car.

The witnesses, the chauffeur and a passenger, say that the motorman did not ring the bell or give any warning whatever of the approach of the car; that if he did so they did not hear it. However, the passenger says he heard a rumbling noise, looked out at the side, saw the white headlight of the car, called to the chauffeur to jump, and at that moment the crash came. The chauffeur says he had taken the middle of the street, and was thus on the car track, because of the fog and the danger to pedestrians who might undertake to cross from a side street in front of the machine, and because he knew that one of the streets intersecting with Tacoma avenue was torn out and could be crossed only over the car track. Upon this state of facts, plaintiff rested his case; whereupon defendant moved for a nonsuit. This was granted, and plaintiff has appealed.

Mar. 1909]

Opinion Per CHADWICK, J.

The sole ground upon which the learned trial judge based his ruling was that appellant was guilty of such contributory negligence as to preclude a recovery, in that he had voluntarily run the automobile on the track of the respondent, and had failed to look back from time to time; whereas he might and should have driven it over that part of the street lying between the car track and the curb, usually and more properly sought out by drivers of vehicles. In passing upon the question before it, the court said:

"It seems to me, under the authorities, that when one goes on a car track, follows it without paying any attention as to whether the car is coming or not, and never looking around or making any attempt to protect himself, it is contributory negligence under the law."

His decision rests upon the proposition that the mere fact that plaintiff's chauffeur was driving his automobile upon the street car track without looking back or anticipating the approach of a car was negligence *per se*. The street and the whole width thereof was open to vehicles, and it has been frequently held that the mere use of a car track by the driver of a vehicle is not negligence as a matter of law. *North Chicago Elec. R. Co. v. Peuser*, 190 Ill. 67, 60 N. E. 78; *Mertz v. Detroit Elec. R.*, 125 Mich. 11, 83 N. W. 1036; *Traver v. Spokane St. R. Co.*, 25 Wash. 225, 65 Pac. 284; 27 Am. & Eng. Ency. Law (2d ed.), 57.

It is true that it puts upon the driver of the vehicle a greater degree of care, but it does not put upon him the burden of keeping a lookout to the rear to the exclusion of his duty to look ahead. The duty to look ahead is paramount. The red rear light is in itself a warning upon which the driver has a right to rely for protection from oncoming cars or vehicles, which, although they have a paramount right of way, must assert it in some accepted manner, as by ringing a bell or sounding a whistle, so that the driver may clear the way for the one to whom it more properly belongs. Whether the chauffeur was guilty of contributory negligence

in driving his automobile along the track, under the circumstances, was a question of fact. The driver owed a duty to pedestrians as well as to the street car company, and the jury may have found that, considering the fog and darkness, it was the part of prudence for him to take the center of the street rather than the open roadway at the side. Another fact which it would seem the lower court overlooked is that the witness Sullivan testified that, after he had jumped out of the automobile and the car had run from eighty-five to one hundred feet, and after the headlight of the car had been demolished, he could see and distinguish the men in charge of the car. If the jury found this to be true, it would be evidence tending to show that the motorman, considering the character of the night and the fact that he had reversed his car and overtaken the automobile, itself running ten or twelve miles an hour, within a distance of four blocks, was running at a dangerous rate of speed, and especially so if it should also be found that the motorman was not sounding any bell or alarm.

It was the opinion of the lower court that this case falls within the rule of *Skinner v. Tacoma R. & Power Co.*, 46 Wash. 122, 89 Pac. 488. In that case it appeared that Skinner was not only acquainted with the movement of the cars at and about the place of the accident, and had reason to anticipate the danger, but as is said in the opinion, he "carelessly walked upon the track, within ten feet of an approaching car with all its lights burning. He stepped directly into the rays of the headlight of the car. There was nothing to obstruct his view." In that case, however, this court took occasion to define the duty of a motorman, and in so far as it did, it applies to the case at bar:

"If the motorman sees a clear track and has no occasion to stop and no reason to anticipate danger to another, it would not be negligence to maintain the usual rate of speed, even over a crossing. But if he sees, or ought to see, persons or vehicles thereon, not able to get out of his way readily, it

Mar. 1909]

Opinion Per CHADWICK, J.

would certainly be negligence not to have such control of his car as to be able to stop before reaching such crossing."

In speaking of the universal knowledge and customs which in justice have the force of law and which make it the duty of the party who can more easily and readily adjust himself to the exigencies of the case, to do so, Judge Dunbar says, in the case of *Helber v. Spokane Street R. Co.*, 22 Wash. 319, 61 Pac. 40:

" . . . the motorman has the right to presume that such duty will be performed. Of course, if he discovers, or ought, as a prudent person, to discover, that it will not be performed, his duty is to stop in any event; otherwise, he will subject himself and his company to the charge of wilful negligence."

Whether the motorman had no reason to anticipate danger cannot be found, as a matter of law, from the mere fact that the car had a right of way over the street car track. Such a rule would exempt street car companies entirely. If, considering the lights on the car, the lights on the automobile, the foggy night, and all other circumstances attending the accident, he should have seen the automobile, was for the jury. If the jury found that he did, or should have seen the automobile in time to avoid the accident, and did not do so, he would be negligent. If it found that he did not and could not, in the exercise of reasonable care and prudence, see the automobile in time to prevent the accident, he would not be guilty of negligence.

The case of *Burian v. Seattle Elec. Co.*, 26 Wash. 606, 67 Pac. 214, declares the rule, that a failure to look and listen does not constitute negligence as a matter of law, but that the jury might find from all the facts disclosed on the trial whether under his peculiar surroundings it was the duty of the pedestrian to look or listen. In considering the duty of a street railway company to the public no distinction is made between pedestrians and vehicles. 27 Am. & Eng. Ency. Law

(2d ed.), 58; Nellis, *Street Railways*, p. 343. The law is best stated in *Mertz v. Detroit Elec. R. Co.*, *supra*, where the following instruction was requested:

"The cars of the defendant company have the right of way upon its tracks, and defendant's motorman had the right to assume that any horse and vehicle would not be upon the right of way, and had the right to operate his car under the assumption that the right of way would be clear, and, to propel the car at the rate allowed by law of 15 miles an hour."

The court said:

"This request does not correctly state the law. The defendant company does not have the exclusive right of way over the part of the street in which its track is laid. The drivers of ordinary vehicles are in no sense trespassers upon the track, and one in charge of a street car is bound to know this. The duties of a driver of a wagon on the track and a motorman are, in some sense, reciprocal. The duty of the latter, at the very least, is to keep a lookout ahead; and, when it becomes apparent that the track is occupied by a vehicle which cannot be gotten off in time to avert a collision, it is his duty to bring the car to a stop."

This case is reversed and remanded for further proceedings in the court below.

RUDKIN, C. J., DUNBAR, FULLERTON, GOSE, CROW, and MOUNT, JJ., concur.

Mar. 1909]

Statement of Case.

[No. 7756. Decided March 3, 1909.]

CHARLES M. DIAL, *Respondent*, v. INLAND LOGGING
COMPANY, *Appellant*.¹

CORPORATIONS — OFFICERS — COMPENSATION — CONTRACT FOR SERVICES—EVIDENCE—SUFFICIENCY. It is sufficiently shown that the three directors of a company each owning one-third of the capital stock, were to devote their time to the company without other compensation than the anticipated profits, where it appears that there was no express contract to pay wages, and under the by-laws their duties were to be performed without payment other than for traveling expenses in the absence of a contract therefor, and plaintiff's filing of a claim for a lien for wages, and assignment thereof for about one-half the face value, without any demand made on the company, shows his bad faith; since a director cannot recover for services upon an implied contract, unless the services were clearly outside of his ordinary duties and it was well understood they were to be paid for.

SAME—CONTRACT—DEFINITENESS. A statement by a director of a corporation that he always reckoned wages to be deducted before computing profits, is too indefinite to constitute a contract to pay compensation for the services of a director.

PAYMENT—ASSIGNMENTS—COMPROMISE AND SETTLEMENT. An assignment of a claim by a creditor to the debtor constitutes a settlement and payment of the claim.

ASSIGNMENTS—NOTICE TO DEBTOR—EQUITIES—SETTLEMENT. The assignment of a claim to a third person, without notice to the debtor, does not deprive the debtor of equities subsequently arising by reason of payment to or settlement with the debtor.

RECORDS—ASSIGNMENTS—CONSTRUCTIVE NOTICE. There is no law authorizing the recording of an assignment of a claim, and the record thereof is not constructive notice to the debtor.

Appeal from a judgment of the superior court for Island county, Still, J., entered March 24, 1908, upon findings in favor of the plaintiff, in an action to recover for services performed and to foreclose a lien therefor. Reversed.

Albert D. Martin and *H. A. Martin*, for appellant.

B. B. Crawford, for respondent.

¹Reported in 100 Pac. 157.

Gose, J.—This action was instituted by the respondent against the appellant to recover a judgment for the sum of \$969.56, and to foreclose a laborer's lien filed on certain personal property to secure the same, which amount and claim of lien were assigned to him by one A. F. Peters. From a judgment against the appellant for the sum of \$400, but denying the lien, it prosecutes this appeal.

The complaint avers in substance, that on the 6th day of October, 1906, the appellant made an oral contract with the said Peters, whereby it agreed to pay him the reasonable value of his services as foreman of its logging camp; that pursuant to the contract Peters performed services for it as such foreman for a period of six months; that the reasonable value of such services was \$150 per month, making in the aggregate \$900; that under a similar contract Peters, upon the expiration of such period, performed services for it of the reasonable value of \$69.56; that such claim had been assigned to the respondent.

The alleged claim grew out of the following facts: On the 8th day of October, 1906, the said A. F. Peters, C. O. Walston and G. A. Wahlstrom, the last two of whom were brothers, organized a corporation with a paper capitalization of \$25,000, for the purpose of engaging in the logging and lumbering business. At this time Peters put into the corporation a fifteen hundred dollar note. Walston and Wahlstrom each paid the sum of \$2,500. Later C. O. Walston put into the corporation an additional sum of about \$4,500, and his brother about \$2,500. In the articles of incorporation it is provided that C. O. Walston, A. F. Peters and G. A. Wahlstrom shall constitute the board of trustees for the first six months. A few days subsequent to the signing of the articles of incorporation, the three incorporators adopted and certified by-laws for the government of the corporation, and elected the said Peters as president, C. O. Walston as secretary and manager, and G. A. Wahlstrom as vice president.

Mar. 1909]

Opinion Per GOSZ, J.

Art. 7, subd. 3 of such by-laws gives the president, subject to the advice of the trustees, the power to direct the affairs of the corporation. Art. 5, subd. 3, empowers the trustees "to supervise all officers, agents, and employes and see that their duties are properly performed." Touching the compensation of the officers and trustees, it is provided in Art. 10, that "the board of trustees shall be allowed their reasonable traveling expenses when actually engaged in the business of the company, to be audited and allowed as other cases of demand against the company"; and that "the officers shall receive such compensation as the board of trustees shall from time to time fix and determine."

The evidence shows that Peters was the foreman of the logging camp for six months, and that he acted as a general utility man for one month; that there was no express contract of employment between the appellant and himself; that a few days before the execution of the articles of incorporation, he had a conversation with C. O. Walston, in which the latter said to him, in substance, that in his business he always reckoned wages to be deducted before he computed a profit; that C. O. Walston devoted almost his entire time to the business of the corporation, and that a part of the brother's time was occupied in promoting its interests; that Peters at no time mentioned wages to his co-trustees; that he filed his claim for a lien in the sum of \$969.56, and assigned it to the respondent for a consideration of \$400, without making any demand for payment; that about five days after such assignment, in consideration of the payment to him of the sum of \$375 by the appellant, he executed and delivered to it an instrument of writing as follows:

"I, A. F. Peters, for and in consideration of the sum of \$375, to me in hand paid by the Inland Logging Company, the receipt whereof is hereby acknowledged, do hereby assign, set over and transfer to the said Inland Logging Company, all my right, title and interest in and to the said Logging

Company and any and all claims which I may have at this date. Dated this 20th day of May, 1907. A. F. Peters;”

that at this time he said nothing to the appellant about the claim or its assignment; that the three incorporators were to have one-third each of the capital stock, and that its profits were to be divided on a like basis.

A careful reading of the by-laws of appellant and the evidence in the case makes it certain that it was the intention of each of the incorporators to devote his talent and energies to the prosecution of the corporate business, without wages, save such as they expected would result in the way of profits. What they believed would be a profitable enterprise terminated in a loss. The fact, however, that a profit did not result does not entitle Peters to make a charge for his services. The fact that Peters worked for seven months, filed a lien against the property of the appellant for \$969.56, and sold it for \$400 without either a demand for payment or any notice to the debtor that he asserted a claim against it, makes it reasonably certain that his demand was not made in good faith. We are not impressed with his explanation that he assigned the claim to the respondent for \$400 for the reason that he was in need of money. The fact that he was in need of money, if his claim had an honest basis, would have induced him to undertake to settle the same with the appellant rather than to make such a sacrifice. Indeed, his several acts lead irresistibly to the conclusion that he was not to be compensated for his work except from such profits as might result from the enterprise. It is also worthy of observation that as a trustee the by-laws made it his duty “to supervise all officers, agents and employes and see that their duties were properly performed.” This was just what he did. It was his duty under such by-laws to do this without compensation other than reasonable traveling expenses when actually engaged in the business of the company, in the absence of evidence of an express or implied agreement to pay him. The law governing com-

Mar. 1909]

Opinion Per Gose, J.

pensation in such cases is very clearly stated in *Brown v. Republican Mountain Silver Mines*, 17 Colo. 421, 425, 30 Pac. 66, in the following words:

“But even if the more liberal rule may be resorted to in some cases, it certainly should be held that a director cannot recover compensation for services rendered by himself to his corporation *upon an implied contract* unless it be established by a clear preponderance of the evidence, first, that the services were clearly outside his ordinary duties as a director, and, second, that they were performed under circumstances sufficient to show that it was well understood by the proper corporate officers as well as himself that the services were to be paid for by the corporation.”

This court, in *Burns v. Commencement Bay Land & Imp. Co.*, 4 Wash. 558, 566, 30 Pac. 668, 709, recognizes the same view in the following language:

“It seems to us, however, that the better authority is the other way, and that a trustee or officer of a corporation cannot recover pay for such services without an express provision therefor, and this must come from the articles of agreement or by-laws, or from some other source or authority than the action of the trustees themselves. Where a trustee of a corporation performs services which are clearly outside of his duties as trustee, as, for instance, where he is an attorney at law, and attends to the litigation of the company, he may recover pay for such services, but it must appear before any recovery can be had therefor, or for any services rendered by a trustee in the absence of any provision for payment, that the same are outside of his official duties, so that there can be no room for doubt in the premises. In *New York etc. R. Co. v. Ketchum*, 27 Conn. 169, it is said that—‘doubtless a director may perform extra labor, and for it be justly entitled to a compensation for his time and expenses, and this may be made out even without an express promise, for a promise may be implied from the peculiar and extraordinary services rendered, but then the services must appear to be of an extraordinary character, and this beyond all question or doubt, for as director he agrees to give his services, and is entitled to make no charges whatever, however severe and protracted

may be his labors. A different rule would lead to great abuses and corruption. We cannot but think it important in every case, that, where a person holding the position of a director, expects or may be fairly entitled to expect a compensation for his services, the services should appear to have been agreed for, or their nature and extent should appear to be such as clearly to imply that both parties understood they were to be paid for, and not rendered gratuitously within the scope of a director's duty. . . . That directors have no right to charge for performing official duty, is a principle universally admitted to be sound law. We find it so laid down in the elementary books, and in several decided cases, and the reasons assigned most forcibly commend themselves to our approbation.' ”

The conversation between Peters and Walston as to wages is too indefinite to constitute an express contract for compensation, and the evidence as an entirety excludes the thought that there was an implied one.

There is another rule of law which precludes a recovery, viz., the assignment of the claim to the appellant heretofore set out was made without notice of the assignment to the respondent. An assignment of a claim by a creditor to the debtor is, in legal effect, a settlement and payment of the claim. The rule is thus stated in 4 Cyc., pp. 33-4:

“But until notice of the assignment is given to the debtor it will not bind him so as to deprive him of equities arising between the date of the assignment and the date when he received notice thereof. As to such equities the assignment takes effect from the time the debtor receives notice and not from the time of the assignment.”

We are not aware of any statute, and none has been called to our attention, requiring or authorizing the recording of an assignment of a lien of the character of the one in this case. In the absence of such a statute the recording of the assignment to the respondent before the assignment to the appellant did not operate as constructive notice. *Howard v. Shaw*, 10 Wash. 151, 38 Pac. 746; *Fischer v. Woodruff*, 25

Mar. 1909]

Syllabus.

Wash. 67, 64 Pac. 923, 87 Am. St. 742; 2 Pomeroy's Equity Jurisp. § 651. It follows, therefore, that the appellant had neither actual nor constructive notice of the assignment to the respondent.

For the reasons stated, the case will be reversed with instructions to dismiss the same.

RUDKIN, C. J., FULLERTON, CHADWICK, CROW, DUNBAR, and MOUNT, JJ., concur.

[No. 7741. Decided March 9, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v. H. C.

LITTOOY, *Appellant*.¹

CONSTITUTIONAL LAW—DUE PROCESS—PHYSICIANS—DENTISTRY—REQUIRING LICENSE—REASONABLENESS. Requiring a diploma from a dental college as a prerequisite for examination for a license to practice dentistry does not violate the 14th Amendment and is not an unreasonable exercise of the police power, although there is no such college in the state, and although the applicant might be as qualified and able to pass the examination as any holder of a diploma.

INDICTMENT AND INFORMATION—SUFFICIENCY—PRACTICING DENTISTRY WITHOUT LICENSE. An information for practicing dentistry without a license, in the language of the statute, is sufficient without alleging the nature of the disease or lesion or the treatment.

WITNESSES—CROSS-EXAMINATION. It is not error to limit the cross-examination of a prosecuting witness who had dentistry done for the purpose of prosecuting, where the range of inquiry showed the motives of the witness and tested his credibility.

PHYSICIANS—DENTISTS—PRACTICING WITHOUT A LICENSE—PROSECUTION—EVIDENCE OF INDUCEMENTS. That a witness went to a dentist's office and had a cavity filled, is not evidence that he offered inducements to the defendant to commit the crime of practicing without a license.

SAME—DEFENSES. That a witness had dentistry work done with a view to prosecuting the dentist for practicing without a license, is not a defense nor any objection to conviction.

¹Reported in 100 Pac. 170.

SAME—ABSENCE OF LICENSE—EVIDENCE—ADMISSIBILITY. Bal. Code, § 3030, making the certificate of the county auditor that no license to the defendant to practice dentistry was on file in his office *prima facie* proof of the absence of such license, is not exclusive and does not preclude evidence of the deputy auditor that there was no such certificate of record.

SAME—EVIDENCE OF TREATING OF DISEASE—SUFFICIENCY. That a dentist filled a cavity in the teeth of the prosecuting witness is sufficient evidence that he treated a disease or lesion of the teeth, within the statute prohibiting the same without first securing a license.

Appeal from a judgment of the superior court for King county, Frater, J., entered June 6, 1908, upon a trial and conviction of practicing dentistry without a license. Affirmed.

Reynolds, Ballinger & Hutson, Kitt Gould, and Charles M. Fouts, for appellant.

Kenneth Mackintosh and John H. Perry, for respondent.

GOSE, J.—The appellant was tried, convicted, and sentenced upon an information charging him with the crime of practicing dentistry without a license. From such conviction he is prosecuting this appeal.

The charging part of the information is as follows:

“He, the said H. C. Littooy, in the county of King, state of Washington, on the 25th day of March, A. D. 1908, then and there being, did then and there wilfully and unlawfully practice dentistry and did perform operations or parts of operations, and did treat diseases or lesions of the human teeth and of jaws, without registering and procuring a license as required by law, in that he, said H. C. Littooy, did then and there wilfully and unlawfully for a fee, salary and reward, paid to himself, for the acts and operations, and parts of operations, herein mentioned, treat disease and lesion of the human teeth of one F. B. Reynolds, said F. B. Reynolds then and there being a living human being, and then and there being afflicted with a disease and lesion of his said teeth, said defendant then and there not having, as required by law, first procured and filed for record in the office of the county auditor of said county, a certificate per-

Mar. 1909]

Opinion Per Gose, J.

mitting and authorizing the said defendant to practice dentistry within the state of Washington."

Eighteen errors are assigned. The appellant groups assignments 1, 2, 14, 15, and 16, and under them urges that the dental law is unconstitutional as violative of the fourteenth amendment of the Federal constitution, in this: First, that the requirement that a party must have a diploma from a dental college in good standing as a prerequisite to his right to an examination is unreasonable; second, that there being no dental college in this state, the requirement for such reason is unreasonable; and third, that the only reasonable test is one's ability to pass the required examination. The appellant sought to raise the last two points by a special plea of fact, which was stricken. In support of these three propositions, which are argued together, it is urged that the holder of a diploma is required to pass an examination as to his qualifications, and that it is the examination and not the possession of the diploma that ultimately determines his qualification to practice dentistry; that the holder of the diploma becomes privileged to the extent that he has a right to an examination to determine his qualification, whilst others, equally qualified but having no diploma, are denied this right; that a law which prevents a qualified person from proving his fitness, thereby excluding him from engaging in a usual occupation which he has a natural right to pursue, is not reasonable.

It is insisted that the facts set forth in the special plea distinguish this case from the former decisions of this court. The law has been held constitutional in the following cases: *State ex rel. Smith v. Board of Dental Examiners*, 31 Wash. 492, 72 Pac. 110; *In re Thompson*, 36 Wash. 377, 78 Pac. 899. We quote the following from *State ex rel. Smith v. Board of Dental Examiners*, *supra*, at page 495:

"For years the policy of the state prior to the passage of this act had been to require all persons engaged in the practice of dentistry to pass an examination before the dental

board of examiners, and for one to even be admitted to such examination he must have been either a dental college graduate, or a practitioner for ten years;”

and from page 497:

“The wisdom of such regulations, pertaining not only to dentistry, but also to the practice of medicine and surgery, is apparent. It is of the highest importance to the state that suffering and afflicted humanity shall not be subjected to the care and treatment of unlearned and unskilled persons. In its effort to prevent such a misfortune to its people, the state may adopt a standard for the test of fitness to engage in the work of what should be a learned profession. When that standard is adopted, those who assume to do the work of such a profession must prove their fitness by the test of such standard.”

In *In re Thompson, supra*, 379, the court said:

“The dental board is authorized by this act to examine all applicants for certificates. To be eligible to this examination, the applicant must possess a good moral character, and present a diploma from some dental college in good standing, and give evidence of the lawful possession of such diploma.”

Again, at page 380, it is said:

“If we are correct in our conclusion that the legislature, in the exercise of its police power, has authority, under the state and Federal constitutions, to regulate the practice of dentistry within the state by reasonable rules, it follows that the legislature may provide that an applicant must be possessed of a diploma from some dental college in good standing. There is nothing unreasonable in this requirement, nor in the other requirements named in the act. Such diploma is evidence of the ability of the applicant to practice dentistry. It is not conclusive of such ability, and the dental board may, therefore, provide reasonable rules for determining the actual ability of the applicant.”

If the second point raised by the special plea is tenable for the reason that there is no dental college in the state, then the first point is well taken, and there being no dental

Mar. 1909]

Opinion Per GOSE, J.

college in the state, it is not competent for the law-making body to require a diploma, either as an evidence of fitness to practice dentistry, or as a prerequisite to the right to have an examination. If the want of a dental college in the state may be used as a test for determining whether the law is a reasonable exercise of the police power, then it is unconstitutional as an entirety, and the legislative power in a given state to safeguard the public health respecting the practice of both medicine and dentistry would depend, not upon the state's needs, but upon the presence or absence of a college, and the regulation would be valid in one state and a nullity in another. One who has no diploma has no just cause for complaint, because the law requires one who has a diploma to pass a satisfactory examination before he can receive a certificate entitling him to practice his profession. We conclude that this case is not distinguishable from the rule announced in the cases *supra*.

It is next urged that the information is defective in that it does not allege the nature of the disease and lesion, nor the nature of the treatment given by the appellant. The offense is charged in the language of the statute, and the information is therefore sufficient. *State v. Lewis*, 42 Wash. 672, 85 Pac. 668; *State v. Smith*, 40 Wash. 615, 82 Pac. 918; *State v. Ryan*, 34 Wash. 597, 76 Pac. 90.

Assignments 3, 4, 5, 6, 7, 8, 9, and 10 are grouped, and present the question whether the appellant was unduly limited in his cross-examination of the complaining witness, the contention being that the witness had the dental work done with the view of prosecuting the appellant therefor. The court permitted the appellant to ask the witness whether such was not his purpose, and he answered that it was not. The range of inquiry in this respect was wide enough to show the motives of the witness and to test his credibility. This was all the law required. The verity of his answers was a fact for the jury to determine.

The 11th assignment is predicated on the refusal of the court to instruct the jury as follows:

"If you find from the evidence that F. B. Reynolds, for whom it is alleged defendant performed the work charged in this cause, solicited defendant to perform said work with the purpose of inducing said defendant to commit a crime, and that the acts performed by defendant, if he performed any of the acts charged in the information, were performed in pursuance and in consequence of said inducements, you will find the defendant not guilty."

The court might properly have refused this instruction on the ground that there is no evidence in the record to support it. There is no evidence that any inducements were used other than that the witness went to the office of the appellant, had him fill a cavity in his tooth, and paid him for the service. Opportunity and inducement are not equivalent terms. *Evanston v. Meyers*, 70 Ill. App. 205; *Love v. People*, 160 Ill. 501, 43 N. E. 710, 32 L. R. A. 139, and *Saunders v. People*, 38 Mich. 218, are cited in support of the requested instruction. The first of these cases was reversed on appeal. The next two were on the question of burglary, where the crime is not complete without a trespass, and where it was in effect held that there cannot be a trespass when the entry is made upon invitation. In *Evanston v. Myers*, 172 Ill. 266, 50 N. E. 204, the prosecuting witness bought beer from the defendant with money furnished by a society which had been supplied by the chief of police to enable the witness to buy from whomsoever was willing to sell, for the purpose of detecting violations of the city ordinance under which the accused was prosecuted. The view of the court is well stated in the following language:

"The appellate court, in passing upon this case, found that the beer was sold as alleged in the complaint, but held that inasmuch as the city furnished the money, and the purchaser was in its employ to discover violators of the ordinance, the offense was one induced by the city of Evanston, and the defendant was not punishable therefor. Under the

Mar. 1909]

Opinion Per GOSZ, J.

facts of the case, as we understand them, we cannot concur in this view. The offense, if one was committed, consists in the unlawful selling of intoxicating liquor. The defendant was passing through an alley in Evanston, with a load of beer, when Denvir hailed him, asking, 'How is it for a case of beer?' to which he replied, 'It is all right.' The money was paid, and the beer handed out. It is clear that Denvir, in making this purchase, used no fraud, deceit, or inducement, other than a willingness to buy. It also appears, uncontradicted, that appellee had sold beer to Denvir at other times in violation of the ordinance in question. On this occasion he was willing to do so again. The offense of selling this beer having been voluntarily committed, is it reasonable to say that the willingness of Denvir to purchase, for whatever purpose or object, constitutes a sufficient inducement to appellee to make the sale, so as to excuse the act? We think not. The offense consisted, not in the buying, but in the selling, of the beer. A number of cases are cited to sustain the theory of appellee's defense, but in those cases the criminal acts charged were not wholly voluntary on the part of the defendant, but were induced in some measure by the acts and conduct of the prosecuting witnesses. The principle here involved is well announced in the case of *Grimm v. U. S.*, 156 U. S. 604, 15 Sup. Ct. 470. In that case a postoffice inspector suspected Grimm of being engaged in the business of selling obscene pictures, and sending them through the mails. Under assumed names, the inspector wrote for a supply of the pictures, and received them from defendant. In defense of the charge made against him, defendant insisted the conviction should not be sustained, because the letters were deposited in the mails at the instance of the government, and through the solicitation of one of its officers. Upon this point the court said: 'It does not appear that it was the purpose of the postoffice inspector to induce or solicit the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business. . . . The law was actually violated by the defendant. He placed letters in the postoffice which conveyed information as to where obscene matter could be obtained, and he placed them there with a view of giving such information to the person who should receive those letters, no matter what his name; and the fact that the person who wrote under these

assumed names, and received his letters, was a government detective, in no manner detracts from his guilt.'"

In *State v. Lucas*, 94 Mo. App. 117, 67 S. W. 971, the prosecuting witness was furnished money by citizens for the purpose of buying whiskey, with the view of prosecuting the seller. The prosecuting attorney knew of this arrangement, and the whiskey was purchased with the money so furnished. In discussing the question as to whether such facts constituted a defense, the court, at page 121, said:

"To discover and bring to justice those who subtly, clandestinely, and illegally dispense liquors, the methods resorted to in this case are sometimes indispensable, and when nothing more than the truth is elicited, and the guilty are brought to justice through their efforts, a valuable service to the community will have been rendered."

This view has received indorsement in the case of *Price v. United States*, 165 U. S. 311, 315, 17 Sup. Ct. 366, 41 L. Ed. 727, in the following language:

"It appears from the bill of exceptions that the Government inspector who instigated the prosecution in this case had been informed that the statute was being violated, and for the purpose of discovering the fact whether or not the plaintiff in error was engaged in such violation, the inspector wrote several communications of the nature of decoy letters, which are set forth in the record, asking the plaintiff in error to send him through the mail certain books of the character covered by the statute, which the plaintiff in error did, as is alleged by the prosecution and as has been found by the verdict of the jury. This has been held to constitute no valid ground of objection. *Rosen's case*, *supra*, 161 U. S., at page 42; *Andrews v. United States*, 162 U. S. 420."

In *People v. Liphardt*, 105 Mich. 80, 62 N. W. 1022, the defendant was convicted of receiving a bribe. A plan of action had been arranged between the chief witness for the state and the town mayor, whereby a third party advised the defendant that the chief witness would accept a propo-

Mar. 1909]

Opinion Per GOSZ, J.

sition from the defendant to sell his vote as a member of the school board for \$100. In furtherance of the plan, the chief witness secured a room, so arranged that the witnesses, whom he caused to be secreted, could overhear a conversation between himself and the defendant. At this interview the defendant accepted money paid by such witness, upon the promise of the former to vote in the way the witness desired. These facts urged as a defense are treated by the court, at page 85, as follows:

"If the facts were shown as stated, the defendant cannot excuse the receipt of money as a consideration for promised official action, merely because he was solicited by Atcherson, even if it were done at the instigation of the officers of the city, who have no right to compromise public justice in any such way. *People v. Laird*, 102 Mich. 135, 60 N. W. 457."

See, also, *People v. Murphy*, 93 Mich. 41, 52 N. W. 1042; *People v. Hanselman*, 76 Cal. 460, 18 Pac. 425, 9 Am. St. 238; *State v. Sneff*, 22 Neb. 481, 35 N. W. 219.

Assignment 12 raises the question as to the manner of proving the absence of a certificate to practice. Bal. Code, § 3030 (P. C. § 4476), makes the certificate of the auditor of the county, to the effect that there is no certificate on file in his office, "*prima facie* proof that said person is not entitled to practice dentistry in such county." This method of proof is not exclusive. In permitting the deputy auditor to testify that there was no such certificate of record in favor of the appellant, no error was committed.

Assignments 13, 17, and 18 present the question of the sufficiency of the evidence to support the verdict. Under this head it is argued that there is no evidence that the appellant treated a disease or lesion of the teeth of the witness. The evidence is that the appellant filled a cavity in the teeth of the witness, and that he was occupied about twenty minutes in the work. This was sufficient, under the rule announced in *State v. Sexton*, 37 Wash. 110, 79 Pac. 634.

There being no error in the record, the case will be affirmed.

RUDKIN, C. J., CHADWICK, FULLERTON, MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 7750. Decided March 9, 1909.]

A. B. STEWART *et al.*, Appellants, v. GRIFFITH DAVIES,
Respondent.¹

VENDOR AND PURCHASER—REMEDIES OF PURCHASER—ACTION FOR BREACH—CONTRACT—RESCISSION BY VENDEE—EVIDENCE—SUFFICIENCY. Findings upon conflicting evidence that a contract for the purchase of land had been mutually rescinded and was not breached by a subsequent sale to another, are supported and will not be reversed on appeal, where it appears that the contract was dated January 19, ten days was allowed to complete the deal, and the property was sold to a third party February 3d, after repeated interviews without completion of the contract, the vendor claiming that the vendee had orally rescinded for inability to perform, and where it appears that the value was probably not more than the purchase price, \$22,500, one witness placing it less, and a \$20,000 option to a third party having recently been permitted to expire, and there having been no great appreciation in value.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered November 13, 1907, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

James B. Howe, C. H. Farrell, and Peter L. Pratt, for appellants.

George E. de Steiguer, for respondent.

GOSE, J.—This action was instituted by the appellants to recover damages for a breach of the following contract:

“January 19, 1906.

“This is to acknowledge the payment by A. B. Stewart of five hundred dollars, it being a part of twenty-six thou-

¹Reported in 100 Pac. 176.

Mar. 1909]

Opinion Per Gose, J.

sand five hundred dollars to be paid by him to me as follows:

"Twenty thousand dollars for tract of land in the Edward Hanford Donation Claim, consisting of twenty acres less a strip taken by city of Seattle for street and water pipe line.

"Four thousand dollars for the west half of the southwest quarter of section three, in township twenty-six, range four, east.

"Two thousand five hundred dollars for the north half of lot 4, in section 15, township 26, 4 east.

"Abstracts are to be furnished for each of these three properties, and ten days is to be allowed for completion of the deal by Stewart.

"Should he want fifteen thousand dollars to enable him to complete the purchases I am to advance him the money, taking a note bearing 7 per cent. interest and mortgage on the land.
Griffith Davies."

From a judgment in favor of the respondent, this appeal is prosecuted.

The complaint avers the making of the contract set forth, a sale of the twenty-acre tract of land situate in the Hanford donation claim to a party other than the appellants, and that at the time of such sale such tract had a reasonable market value of \$45,000 or \$50,000. The answer affirmatively alleged that, after the execution of the contract and before such sale, the appellant A. B. Stewart notified the respondent that he could not consummate such purchase, and gave his consent to the respondent to sell the property to persons other than the appellants. Issue was joined on each of these averments, except as to the making of the contract, which was admitted. The court found the following facts which are material to the consideration of the case:

"That thereafter on the 3d day of February, 1906, the defendant sold to Crawford & Conover the twenty-acre tract of land described in paragraph IV of the complaint, less a strip taken by the city of Seattle for street and water pipe line. That from the time of the making and delivery of the document set forth in paragraph I of the complaint, the

plaintiffs were not at any time ready or willing to complete said contract or to pay for the property therein described or any thereof, or the tract of land described in paragraph IV of the complaint, and never at any time offered or expressed their willingness to complete said contract or pay for said properties or any thereof, and failed and neglected, though repeatedly requested, to fulfill said contract or pay for said properties or any thereof up to the time the same was sold to said Crawford & Conover, as aforesaid. That the plaintiff, A. B. Stewart, was notified of the intention of the defendant to make said sale to Crawford & Conover, as aforesaid, and consented thereto."

It will be observed that the contract bears date January 19. The property was sold to Crawford & Conover February 3, following. Was the contract heretofore set forth in force at the time the respondent made such sale? The sale to Crawford & Conover is the only breach assigned. At the time of such sale, the appellants owned a one-seventh interest in the property, the respondent owned four-sevenths, and two other persons owned one-seventh each. The testimony of the respondent, in substance, is that the appellant A. B. Stewart, a few days prior to the sale of the property to Crawford & Conover, said to him that he could not carry out the sale; that his interests were with the respondent, and that the respondent could sell the property to parties other than the appellants. This the appellant Stewart stoutly denies. Between the date of the contract and the sale of the property to a third party, there were several other conversations between such appellant and the respondent in relation to the property, but the testimony as to what was said in each of them is equally conflicting. The value of the property at the time of the sale to Crawford & Conover, therefore, bears materially on the merits of the controversy. Here we find the evidence also conflicting. The purchasers paid \$22,500 for the property. The value placed upon it by numerous witnesses ranges from \$20,000 to \$50,000. Mr. Crawford, a member of the purchasing firm, fixed its

Mar. 1909]

Opinion Per Gose, J.

value at \$20,000, or \$2,500 less than the selling price. The trial judge, who probably knew the witnesses, found its value to be not more than \$22,500. This estimate of value is supported by a preponderance of the evidence. It also has the support of the circumstances surrounding the transaction. At the time of the execution of the contract to the appellants, a third party had recently permitted his option to purchase the property for \$20,000 to lapse. There is no evidence tending to show any facts or circumstances which would cause the property to have any great appreciation in value between January 19 and February 3. The only evidence of such appreciation is the personal opinion of the appellants' witnesses, seemingly not based upon any important fact. We have not overlooked the fact that the appellants claim to have made a contract of sale of a one-third interest in the property to one Calhoun for \$10,000, about January 30, 1906. The appellants' testimony is somewhat confused as to whether Calhoun had deposited with him his check or cash to this amount. It is stated both ways in the record. It is evident that the trial court was not favorably impressed with this testimony.

The conflict in the evidence is such that no useful purpose would be served by a further review. The learned trial judge saw the witnesses and heard them testify; there is ample evidence in the record to support his findings, and we will not disturb them. The judgment will therefore be affirmed.

RUDKIN, C. J., CHADWICK, FULLERTON, CROW, MOUNT, and DUNBAR, JJ., concur.

[No. 7758. Decided March 9, 1909.]

ARGO MANUFACTURING COMPANY, *Respondent*, v. WILLIAM E.
PARKER *et al.*, *Appellants*.¹

MECHANICS' LIENS — PERSONAL LIABILITY — JUDGMENT — JOINT OR SEVERAL JUDGMENT. In an action to foreclose a mechanics' lien, it is error to enter a joint judgment for the value of the material against the several owners of two houses to whom the material was delivered in common and so charged against them, where it was agreed that, the houses being identical, the delivery should be in common, but that each should pay one-half of the value thereof, to be taken out of their several salaries, each being employed by the plaintiff.

CORPORATIONS — CONTRACTS — EMPLOYMENT OF OFFICER — IMPLIED CONTRACT FOR WAGES — PAYMENT — BURDEN OF PROOF. An officer and stockholder owning only two shares of stock, who is employed to work for the company, is presumed to be entitled to reasonable wages, which he may recover or offset upon showing the rendition and value of the services; the burden of showing payment being upon the company.

SAME. Where a corporation made salary payments to each of its officers from time to time, an officer devoting all his time to the business, as president and general manager, is entitled to offset any balance due for wages, at their reasonable value, against the value of material sold to him by the corporation.

SAME — WAGES DUE STOCKHOLDERS — ESTOPPEL — RECITALS IN BILL OF SALE. In a bill of sale of the assets of a corporation, joined in by the stockholders, the recital that the corporation is in no way indebted to the stockholders operates as an estoppel against claims by the stockholders for wages due them from the corporation.

SAME — CONTRACTS — SALES BY GENERAL MANAGER TO HIMSELF — RATIFICATION. The sale of material to himself by a general manager of a corporation, is ratified by the corporation by suit brought to recover the value of the material.

Appeal from a judgment of the superior court for King county, John Kelleher, Esq., judge *pro tempore*, entered May 20, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to enforce a materialman's lien. Reversed.

¹Reported in 100 Pac. 188.

Mar. 1909]

Opinion Per Gose, J.

Z. B. Rawson and S. D. King, for appellants.

Aust & Terhune, for respondent.

GOSE, J.—This action, instituted by the respondent to recover from the appellants the sum of \$1,506.08, and to foreclose a materialman's lien filed to secure the payment of the same, terminated in a joint judgment against the appellants for \$960.90, and a denial of the lien. From such judgment, this appeal is prosecuted.

The complaint avers that the respondent furnished to the appellants William E. Parker and Charles W. Caskey, jointly, building material for the construction of two houses, of the value of \$1,506.08; that William E. Parker and Lillie Parker are husband and wife, and that Charles W. Caskey and Edith E. Caskey are husband and wife. The appellants William E. Parker and Lillie Parker, answering separately, admitted that they are husband and wife, and denied that any building material was furnished to Parker and Caskey. They pleaded affirmatively that the appellant William E. Parker performed labor and rendered services for the respondent as vice president, agent, and salesman, for the period of twenty-one months, for the agreed salary of \$100 per month; that \$570 and no more had been paid thereon. The respondent, replying, admitted the payment, and denied all the other matters affirmatively pleaded. The appellants Charles W. Caskey and Edith Caskey admitted that they are husband and wife, and denied that any building material was furnished to Parker and Caskey. They pleaded affirmatively that there was a balance of \$723.39 due the appellant Charles W. Caskey from the respondent for services which he had rendered it as an employee; that there was a balance of \$961.13 due George J. Caskey, a balance of \$590.92 due Edward Caskey, and a balance of \$580.29 due Bert Caskey, from the respondent, for services which they respectively had performed for it as employees; that such accounts had been assigned to them. The respondent, re-

plying, put these several matters in issue, and pleaded affirmatively certain facts as constituting estoppel, to which we will later refer. The court found the following facts material to this inquiry:

"(3) That on, to wit, the 16th day of March, 1906, the defendants, W. E. Parker and Charles W. Caskey, jointly undertook to improve the property hereinafter described, by erecting thereon two certain houses; and that in accordance therewith the plaintiff herein, at the instance and request of the said Charles W. Caskey and William E. Parker, furnished materials to be used in the construction of the said houses and the improvement of the said property, which materials so furnished to the said Parker and Caskey were at the agreed price and reasonable value of \$1,466.56, for which amount the said Charles W. Caskey and William E. Parker contracted to pay this plaintiff for said materials.

"(6) That no part whatsoever of said sum of \$1,466.56 has been paid, although payment has been demanded of defendants.

"(7) That on the 15th day of January, 1907, there was due and unpaid to George J. Caskey from the plaintiff for services rendered at its request as an employee in its said service, the sum of \$496.13, being at the rate of \$75 per month for six and one-half months; that on said 15th day of January, 1907, said George J. Caskey, by assignment in writing, duly assigned and transferred said claim for services to the defendant Charles W. Caskey, and that said sum is an offset against the amount due for materials furnished, as hereinbefore set forth."

It also made the following conclusion of law:

"That the Argo Manufacturing Company is entitled to judgment against the defendant William E. Parker, Lillie Parker, his wife, and Charles W. Caskey and Edith E. Caskey, his wife, in the sum of \$960.90, together with interest thereon at the legal rate from October 25th, 1906, together with its costs and disbursements herein to be taxed."

The appellants assign error as to findings of fact 3 and 6, and the conclusion of law deduced therefrom. The evidence shows, that in the month of July, 1905, the appellants

Mar. 1909]

Opinion Per GOSE, J.

Charles W. Caskey and William E. Parker, together with Albert Caskey and Edward Caskey, sons of Charles W. Caskey, organized the respondent corporation; that they owned all of its capital stock until January 17, 1907, when the entire capital stock and assets of the corporation were transferred by a bill of sale to the Union Savings & Trust Company, a banking corporation, to which it was heavily indebted at such time; that the bill of sale was signed by the several stockholders, and recited that such stockholders were the owners of stock in the respondent corporation in the amounts following: Charles W. Caskey, seventy shares; William E. Parker, two shares; Albert Caskey, sixty-five shares; Edward Caskey, sixty-three shares; that such stockholders therein agreed with the purchaser as follows:

“And for the purpose of making the same clear, it is hereby declared that the said corporation [meaning the respondent] is in no manner indebted to the undersigned or any of them.”

The evidence further shows that, from the date the respondent corporation was organized until such sale, the appellant Charles W. Caskey was the president and general manager of the respondent; that the appellant William E. Parker was its vice president, soliciting agent, and collector; that Edward Caskey was its secretary and treasurer, and that they each worked continuously for it during such period, in their respective capacities; that George Caskey and Albert Caskey were in the employ of the respondent during the same period; that in the year 1905 the appellants Charles W. Caskey and wife purchased one-half of a certain lot, and the appellants William E. Parker and wife purchased the other half of such lot; that in 1906 the appellants Charles W. Caskey and William E. Parker each erected a house upon his own property; that they purchased building material from the respondent which entered into the construction of such houses; that the larger part of such material was charged upon the daily sales book to the appellant William

E. Parker, and upon the ledger to Parker and Caskey; that it was sometimes ordered by Parker and at other times by Caskey, and delivered to them in common; that Parker did not know that the same was so charged. This, in substance, is all the evidence the record contains tending to support the joint judgment. As against this the appellants Charles W. Caskey and William E. Parker both testified, that the two houses were in all respects identical; that it was agreed between them that the material should be delivered to them in common, but that each of them should pay to respondent one-half of the value of the same; that such payment should be made by each of them out of his salary as it accrued. The evidence is convincing that the material was sold and delivered to them in the manner and under the contract stated in their testimony. It follows that the court erred in rendering a joint judgment against them.

We will next consider the status of the case as to the appellants Parker. The evidence shows that William E. Parker worked for the respondent for a period of eighteen months, and that his services were reasonably worth \$100 per month. As we understand the pleadings, it is admitted that he had received only \$570 for his services. It cannot be successfully urged that, because he was an officer and a stockholder, he was not entitled to wages. As we have shown, he owned only two shares of its capital stock. This being true, there arose from the rendition of his services an implied contract that the respondent should pay him their reasonable value. It was competent for the general manager to sell the material to him upon his engagement to pay for the same out of his salary as it accrued. We have not found any evidence in the record which shows that he was paid a greater sum than \$570, which is the amount he admits having received. The recital in the bill of sale is only an estoppel against him as to his salary in excess of his indebtedness to the respondent at the time of its execution. His salary as it was earned, according to his contract, applied as a payment *pro tanto* upon

Mar. 1909]

Opinion Per GOSE, J.

his indebtedness. He having proven the rendition of his services and their value, the burden was on the respondent to show payment. This it failed to do. It appearing, therefore, that his accrued salary at the time of the sale was greater than his indebtedness to the respondent, the case should have been dismissed as to the appellants Parker.

Passing to the consideration of the case with reference to the appellants Caskey, the evidence shows that the respondent from time to time made salary payments to each of the officers, stockholders, and employees; that Charles W. Caskey devoted his entire time to the business of the respondent as its president and general manager for a period of eighteen months, and that his services were worth \$150 per month. He is entitled to offset any balance due him for wages estimated on such basis, against the value of the material which the respondent furnished him for the construction of his house. We have not been able to determine this offset from the evidence. Some of the respondent's exhibits are not in the record, notably exhibits V and others referred to in the testimony of the accountant W. E. Kesil.

Appellants urge that there should also be a deduction of the assigned accounts of Edward Caskey, George Caskey, and Albert Caskey, for the wages due each of them at the time of the execution of the bill of sale. A proper credit was given by the trial court on the George Caskey assignment. The recital in the bill of sale operates as an estoppel as to the wages of Edward and Albert Caskey at such time. The respondent urges that the appellant Charles W. Caskey could not, as general manager, sell to himself, as such conduct was hostile to the interests of his principal. A sufficient answer to this contention is that the respondent has ratified the sale by a suit to recover the value of the material which was sold to him. The conduct of all of the stockholders shows that it was their intention that each thereof should devote his time to the promotion of the enterprise, and that each should be paid the reasonable value of his services.

The legal principles announced herein are fundamental, and the citation of authority is not necessary.

The case will be reversed, and the trial court directed to dismiss the same as to the appellants Parker. As to the appellants Caskey, the court will first deduct from the judgment the one-half thereof paid by the appellants Parker, and second, ascertain the amount of any balance due them on the salary of Charles W. Caskey on the basis of eighteen months' service at \$150 a month, credit such balance on the Caskey indebtedness, and enter judgment accordingly.

RUDKIN, C. J., FULLERTON, CHADWICK, CROW, DUNBAR, and MOUNT, JJ., concur.

[No. 7735. Decided March 9, 1909.]

IDA L. JAMESON, *Respondent*, v. LINCOLN H. KEMPTON,
Appellant.¹

FRAUD—OF AGENT TO PURCHASE LAND—PLEADING—COMPLAINT—SUFFICIENCY. In an action the gist of which was to recover for the deceit of an agent to purchase land for plaintiff in misrepresenting the price he paid for it, the complaint is good, as against a demurrer, without alleging specifically the fact of the agency, its character, terms, scope, etc., or the fact that the property was of less value than the fraudulently represented price, where it appears that the defendant voluntarily undertook to serve the plaintiff and fraudulently concealed and misrepresented the true price paid.

SAME—EVIDENCE—ADMISSIBILITY. In an action for the deceit of an agent to purchase land, in misrepresenting the price paid, the evidence of the value of the land to show that a good bargain was made is inadmissible in defense of the fraud.

SAME—RELIANCE ON REPRESENTATIONS—VENDOR AND PURCHASER. The purchaser of property, unacquainted with values in the locality, may, without making an investigation, rely on the statements of one who undertook to make the purchase for her, and misrepresented the purchase price paid.

SET-OFF AND COUNTERCLAIM—PLEADING. An instruction allowing an offset is properly refused when it was not pleaded.

¹Reported in 100 Pac. 186.

Mar. 1909]

Opinion Per CHADWICK, J.

FRAUD—OF AGENT TO PURCHASE LAND—DEFENSES—SET-OFF. In an action for deceit in misrepresenting the price of land purchased for the plaintiff, defendant cannot offset expenses incurred in making the purchase as agent for the plaintiff, especially where he took no chances and voluntarily paid out the expense to one associated in business with him.

Appeal from a judgment of the superior court for Clallam county, Still, J., entered July 10, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for fraud. Affirmed.

Geo. Venable Smith, for appellant.

William B. Ritchie, for respondent.

CHADWICK, J.—Plaintiff brought this action to recover the sum of \$650, alleged to be the difference between the actual purchase price of a certain piece of property in the city of Port Angeles and the amount paid by her to defendant who, as she alleges, had been authorized to purchase the property for her. The record shows that, after she had directed the purchase, defendant came to her and represented that the owner, being about to raise the price of the property, he had, in order to protect her interests, taken the precaution, without consulting plaintiff, to have a deed executed in his own name, and that the amount asked, and which he had agreed to pay for the property, was the full sum of \$2,150; that upon the payment of that sum to him he would deed the property over to her. She thereupon paid to defendant the sum of \$2,150, by check on the Canadian Bank of Commerce at Seattle. It also appears that plaintiff had been in the city of Port Angeles but a few days and was wholly unacquainted with the values of property therein. In truth, defendant paid the sum of \$1,500 for the property, which sum was in fact paid out of the \$2,150 furnished by plaintiff. Defendant had voluntarily assumed to act for plaintiff. They had been friends for some years and she relied implicitly on all of his statements, believing them to be true.

After interlocutory pleadings had been submitted and overruled, defendant interposed a general denial, and set up as a further affirmative defense that he had purchased the property described in the complaint for himself, and had sold it to plaintiff for the sum of \$2,150, which sum she voluntarily paid, with full knowledge of his relation to the property, as well as of its character and value. He further alleges that plaintiff had lived upon the property for more than two months after the facts attending the transaction had been made known to her, and that she had expressly ratified the transaction and expressed her complete satisfaction with it. The case was tried before a jury, and from a verdict in favor of plaintiff for the full amount demanded, defendant has appealed.

The principal errors assigned are, that the complaint did not state facts sufficient to constitute a cause of action; that the court erred in allowing any evidence to be introduced upon the question of fraud and misrepresentation; that appellant should have been allowed in any event to offset the sum of \$400 against respondent's recovery; and that the testimony is insufficient to support the verdict. We think the complaint was good as against the motion and demurrer. The demurrer is directed to the want of specific allegations in the complaint showing an agency. It is true that the fact of agency is not as well pleaded as it might have been, but agency is not the gist of this action. The fact that appellant was authorized to purchase the property, and voluntarily undertook to serve respondent in that behalf, and that he fraudulently concealed the true purchase price, and by his fraudulent representations induced her to pay him the sum of \$650, is clearly set forth. It is the deceit of appellant that affords a basis of recovery. "The character, terms, scope, commencement, and termination of the agency," if any, thus became wholly immaterial. Nor do we think it was necessary for respondent to allege that the property was of less value than the sum of \$2,150, or that respondent

Mar. 1909]

Opinion Per CHADWICK, J.

had no knowledge or means of knowing its character and value. If appellant undertook to purchase the property for respondent, and actually collected from her the sum of \$2,150, representing to her that he had paid that amount, the value of the property is immaterial. This question was before this court in the case of *Hindle v. Holcomb*, 34 Wash. 336, 75 Pac. 873, wherein the court said:

"Neither was it error to refuse to permit the appellant to testify to the value of the land purchased. If it be conceded that respondent did make a good bargain, that fact would be no justification of appellant's conduct, if it be true that he committed the acts charged against him by the complaint."

The second proposition urged in connection with this assignment finds answer in the case of *Tacoma v. Tacoma Light & Water Co.*, 17 Wash. 458, 50 Pac. 55:

"Where the purchaser may know the truth by looking, or where the truth is shown him, he is not misled, but where he relies upon the statements of the vendor, and has no knowledge that such statements are false, he can, when they are false, and he has been reasonably prudent, recover damages. If no knowledge of their falsity is presented to him, the purchaser may rely implicitly upon the statements of the vendor, if such statements are not so openly and palpably false that their untruth is apparent to an ordinarily prudent person."

Appellant cites a number of cases decided by this court. All of them depend on the principle that a party will be bound to observe, if the means of observation are at hand. But this case presents an entirely different feature. It is a question of fact; not of opinion. *Freeman v. Gloyd*, 43 Wash. 607, 86 Pac. 1051. Inquiry of appellant would have elicited no more than he had already disclosed. There was testimony to the effect that he asked respondent to say nothing to the vendor, who was to remain for a time in the house, about the price paid. Be that as it may, the deceit upon which this case must turn consists in misrepresenting the

purchase price. The value of the property was not, and cannot be, made an issue. It was appellant's duty to disclose the truth. The burden of inquiry was not on respondent, for she had a right to rely upon his statement, and if he misled or deceived her he must meet the consequences.

Error is also predicated on the refusal of the court to give the following instruction:

"I further instruct you that if you do find from the evidence that there was such agency herein as claimed by plaintiff or any agency you must allow defendant the amount of all outlays made by him in procuring said property and the conveyances of the same, such as attorneys fees, brokerage charges and the like and deducted from the amount claimed from defendant by plaintiff herein."

Appellant testified that he had paid to one G. F. Hulbert the sum of \$400 as a brokerage fee, and now contends that in any event that amount should be deducted from the amount of the recovery. We think the instruction was properly refused. The offset, if it be so taken, was not pleaded. Nor do we think it would have been a defense if it had been. One who undertakes to overreach another should not be allowed to offset his expenses against the actual damages sustained by his adversary. The testimony shows that the appellant actually purchased the property from the vendor for \$1,500; that he had shown the property to respondent before he purchased it; that she relied entirely upon his opinion as to the value; that he knew that she would buy it. He took no chances. It further appears that Hulbert had no call or option that would prevent appellant from dealing directly with the owner. In fact, the vendor swears that she had never seen Hulbert. At the time, Hulbert and appellant were associated in business under a tentative partnership agreement. The payment of \$400 was voluntarily paid, if indeed it was ever paid at all. With this view of the facts and the law, we hold that no prejudice resulted on

Mar. 1909]

Statement of Case.

account of the refusal of the court to give the instruction requested.

We have carefully read the record and find no prejudicial error in the admission or rejection of testimony. The case was fairly tried and submitted to the jury, and the evidence is ample to justify the verdict. The judgment of the lower court is affirmed.

RUDKIN, C. J., GOSE, FULLERTON, CROW, MOUNT, and DUNBAR, JJ., concur.

[No. 7055. Decided March 9, 1909.]

SAMUEL V. RAMSEY *et al.*, Respondents, v. GEORGE A. WILSON *et al.*, Appellants.¹

ADVERSE POSSESSION—ENTRY ON PUBLIC LANDS—GOOD FAITH—POSSESSION WITHOUT COLOR OF TITLE—SCHOOL LANDS—JUDGMENTS—PARTIES BOUND—PARTICIPATING IN TEST CASE. There is no entry upon land in good faith under color of title, so as to constitute title by adverse possession, where it appears that defendants went upon the adjoining forty and attempted to file a homestead claim upon the whole tract, knowing that the state claimed the land; that the filing was successfully contested by the state in the land department, after which a test case was appealed by a neighboring settler to the United States supreme court and the decision affirmed, and the defendants contributed to the expense of such appeal and were interested in the result; since there could be no claim in good faith after the adverse decision of the contest, and defendants became bound by the judgment by participating in the appeal in the other test case.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 30, 1907, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

Jay C. Allen, for appellants.

Austin E. Griffiths (Paul Shaffrath, of counsel), for respondents.

¹Reported in 100 Pac. 177.

MOUNT, J.—The respondents brought this action to quiet their title to the southeast quarter of the northeast quarter of section 2, township 25, north, range 3, east, W. M., being forty acres of land in King county. They deraign title from the United States. The appellants in answer to the complaint denied the alleged title of the respondents, and claimed title in themselves by reason of adverse possession for the statutory period. The cause was tried to the court without a jury, and a decree was entered in favor of the plaintiffs. The defendants have appealed.

The evidence shows that the legal title to the land in question stands in the name of the respondents. It appears that this land was selected by the territory of Washington as an "indemnity school selection," which selection was approved in the year 1872. Thereafter the state held the land as school land. In March, 1893, the appellants, Wilson and wife, went upon the land and made some improvements on the southwest quarter of the northeast quarter of the section, being the forty acres lying to the west of the land in dispute, and attempted to file a homestead claim on the whole of the northeast quarter of the section. Their application was rejected in the land office, and upon appeal to the commissioner of the general land office and thence to the secretary of the interior, the ruling of the local land office was approved. Subsequently an action was brought in ejectment by the state against one Anton Johanson, who was claiming a piece of land in the same vicinity under the same conditions. The Johanson case was made a test case. The appellants in this case, while not parties to that case, were interested therein and contributed to the defense thereof, and actively assisted in that case, which was prosecuted to this court (*State v. Johanson*, 26 Wash. 668, 67 Pac. 401), where it was held that the land in controversy there was the property of the state. That case was afterwards prosecuted to the supreme court of the United States (*Johanson v. Washington*, 190 U. S. 179, 23 Sup. Ct. 825, 47 L. Ed.

Mar. 1909]

Opinion Per Mount, J.

1008), where it was affirmed on June 1, 1908. While that litigation was pending and in July, 1896, the state sold the land in dispute in this case to a Mr. Prosch for something over \$5,000. In October of the same year, Mr. Prosch sold to Dr. Ramsey, the father of the respondent S. V. Ramsey. The latter inherited from his father. The land at the time of this trial was of the value of \$50,000. The respondents have paid the taxes upon the land regularly since the state parted with the title. The appellants have resided upon the southwest quarter of the northeast quarter since March, 1893, have made improvements thereon, and have been attempting to hold the whole quarter section adversely to the real owners.

The whole claim of appellants in this action is based upon their claim of adverse possession. There is much conflict in the evidence upon the question whether the appellants have maintained such open, exclusive, notorious, and continued possession of the land in dispute as would show an adverse holding of the forty acres of land owned by the respondents in this case. If the case turned alone upon this question we should be inclined to hold the evidence insufficient to show an adverse holding against these respondents. But upon the undisputed facts, we think there is no such claim of right made in good faith as will support title by prescription in the appellants.

It is not claimed that the appellants have any color of title, but their whole contention rests upon a claim of right and adverse possession asserted for the statutory period. They went upon the forty acres of land lying west of the tract in dispute in 1893. At that time they knew that the state claimed the whole quarter section, but they went there maintaining that the state was wrong in the claim. If at that time in good faith they asserted a claim of right to file upon the land, that claim of right was early contested by the state, and the land department of the government re-

jected it in 1895. After that time the state brought an action in ejectment for other lands held the same as the lands in question. These appellants were directly interested in the result of that litigation and actively defended that case. They were, in substance, parties to it and bound by it. *Douthitt v. MacCulsky*, 11 Wash. 601, 40 Pac. 186; *Shoemaker v. Finlayson*, 22 Wash. 12, 60 Pac. 50. The courts finally, in 1908, concluded the litigation by affirming title in the state. After the year 1895, there was clearly no claim of right made in good faith which could be the basis of an adverse holding by these appellants. The effect of that litigation was to determine that the appellants had no claim of right to the land, and, of course, after that time could not assert such claim in good faith. They were mere squatters and could not acquire title as against the rightful owner. *Blake v. Shriver*, 27 Wash. 593, 68 Pac. 330; *Yesler Estate v. Holmes*, 39 Wash. 34, 80 Pac. 851; *George v. Columbia & Puget Sound R. Co.*, 38 Wash. 480, 80 Pac. 767; *Lohse v. Burch*, 42 Wash. 156, 84 Pac. 722; *May v. Sutherlin*, 41 Wash. 609, 84 Pac. 585; *Morgan v. Northern Pac. R. Co.*, 50 Wash. 480, 97 Pac. 510.

In *Johnson v. Conner*, 48 Wash. 431, 93 Pac. 914, we held that:

“One who enters upon land in good faith, supposing it to be government land, with a view to acquiring title, may, upon discovering his mistake, proceed to hold openly and notoriously in hostility to the actual owner, so as to acquire title by adverse possession in ten years thereafter.”

We think that case is distinguished from this by the fact that there the entry was made in good faith, while in this case it was known that the state claimed the land and the entry was made with knowledge of that fact, and therefore not in good faith. In any event, we do not desire to extend the doctrine there announced so as to say that one may go upon the land of another and acquire title by occupancy where he has neither color of title nor claim of right made

Mar. 1909]

Syllabus.

in good faith, because the statute evidently does not intend that one may by such means acquire title to another's property.

We think the judgment of the lower court was right, and it is therefore affirmed.

RUDKIN, C. J., FULLERTON, CROW, and DUNBAR, JJ.,
concur.

[No. 7550. Decided March 9, 1909.]

A. SIMONS, *Respondent*, v. CHARLES CISSNA *et al.*,
Appellants.¹

APPEAL—REVIEW—DISCRETION—RULINGS ON PLEADINGS. Motions to strike and make a pleading more definite and certain are addressed largely to the discretion of the trial judge, whose rulings will not be reversed where no prejudice resulted.

FRAUD—DECEIT AS TO CREDIT—COMPLAINT—SUFFICIENCY. A complaint for deceit as to the solvency of a corporation is sufficient where it alleges false representations relating to existing material facts, defendants' knowledge of their falsity and intent to deceive, and plaintiff's ignorance and reliance thereon to his damage.

SAME—OPINIONS. A false representation as to the solvency of a corporation is not necessarily matter of opinion, and is actionable where the defendant was familiar with its affairs down to the smallest detail.

SAME—RELIANCE ON REPRESENTATIONS—DUTY TO INVESTIGATE. One is not negligent in failing to investigate representations as to the solvency of a corporation, if they were made under circumstances to justify belief by a reasonably prudent man.

SAME—SOLVENCY—EVIDENCE—SUFFICIENCY. There is sufficient evidence to sustain a verdict for false representations as to the credit of a corporation, where it was represented to be solvent, good for one hundred cents on the dollar, and owning a mill and timber lands with \$20,000 back of it, where in fact but \$5,000 of its capital was paid in, and had been used as a first payment on a contract to purchase its mill and timber lands for \$18,000, subject to forfeiture if \$500 was not paid each month, its stockholders were insolvent, and it had no other assets.

¹Reported in 100 Pac. 200.

BANKS AND BANKING—LIABILITY FOR FRAUD OF OFFICERS. A bank is not liable for false representations as to the credit of a corporation, made by one of its officers, on plaintiff's unsupported allegation that the representations were made by the officer in his official capacity for the bank, it appearing that plaintiff was referred to, and that he went to, and the representations were made by, the officer, and not the bank.

FRAUD—DECEIT AS TO CREDIT—MEASURE OF DAMAGES—INSTRUCTIONS. In an action for damages for false representations as to the solvency of a corporation, whereby plaintiff agreed to log its lands for from \$4.00 to \$4.50 a thousand, and incurred expense in building skid roads, moving donkey engines, and delivering logs, which was lost by the insolvency of the corporation, instructions on the measure of damages allowing recovery for the sum plaintiff had earned under the contract and for the expense incident to the work are erroneous, as they give double damages, regardless of whether profits could be recovered at all.

FRAUD—DECEIT AS TO CREDIT—TEST OF SOLVENCY. False representations that a corporation was wholly solvent and would pay one hundred cents on the dollar, inducing plaintiff to enter into a logging contract of considerable magnitude, go far beyond the test of solvency prescribed by the National Bankruptcy Act; and the proper test of solvency is that it be of the character which permits the discharge of its debts as they fall due in the ordinary course of business.

SAME—INSTRUCTIONS. In an action for deceit as to the credit of a corporation at a certain time, insolvency at a subsequent time is immaterial where the insolvency at the time in question was fully shown; and instructions thereon should not be given.

SAME—SUBSEQUENT TRANSACTIONS. In an action for deceit as to the credit of a corporation at a certain time, what transpired thereafter affecting the question of solvency is material only as it tends to show the extent of the damage.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered January 14, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for fraud. Reversed.

Dorr & Hadley and Hardin & Hurlbut, for appellants.

H. M. White and Pemberton & Sather, for respondent.

RUDKIN, C. J.—On the 15th day of May, 1905, the defendant The Home Security Savings Bank was the owner

Mar. 1909]

Opinion Per RUDKIN, C. J.

of certain mill property and timber lands in Whatcom county. At or about that time, a corporation known as the American Mill & Timber Company was organized with a capitalization of \$20,000 for the purpose of taking over this property. Only \$5,000 had then been paid in on the capital stock of the purchasing company, and no payments on account of stock subscriptions have since been made. On the above date the defendant bank entered into an agreement to sell the mill property and timber lands to the American Mill & Timber Company, in consideration of the sum of \$18,000, \$5,000 of which was paid at the execution of the contract, the balance of \$13,000 to be paid in monthly installments of \$500 per month. The contract contained numerous stipulations and conditions, including provisions that the contract was to be a mere option to purchase, that no right, title, or interest in the property should vest in the purchaser until the full payment of the purchase price, and that the contract should be forfeited, at the option of the vendor, for failure on the part of the purchaser to operate the mill for a period of thirty days, or to make payments when due, or to comply with other provisions of the contract. The \$5,000 paid by the purchasing company was the \$5,000 paid in on its capital stock.

On the 30th day of June, 1905, the plaintiff contemplated entering into a logging contract with the American Mill & Timber Company to log off the lands described in its contract of purchase. The plaintiff was not acquainted with the officers of the company and knew nothing of its financial affairs or standing. He therefore asked the president of the American Mill & Timber Company for a reference as to the company's standing and its ability to carry out its contract. The plaintiff was referred to the defendant Cissna, and informed him that he was about to enter into a logging contract with the American Mill & Timber Company and had been referred to him to ascertain how the company stood financially. Cissna informed the plaintiff that the company

was good financially, that it was wholly solvent and would pay one hundred cents on the dollar, that it had the timber land and mill property and \$20,000 back of it. Relying on these representations, the plaintiff entered into a contract with the American Mill & Timber Company, by which he agreed to haul and deliver fir logs at the rate of \$4 per thousand and cedar logs at the rate of \$4.50 per thousand. Under this agreement the plaintiff expended large sums of money in building and repairing skid roads, in moving donkey engines, and in hauling and delivering logs to the mill. On or about November 1, 1905, the American Mill & Timber Company discontinued business and became insolvent, and the plaintiff has been unable to collect for his services. This action was instituted against the defendants to recover damages for the false and fraudulent representations as to the solvency of the American Mill & Timber Company, and from a judgment in favor of the plaintiff and against both defendants, this appeal is prosecuted.

A series of motions was interposed against the complaint, to strike certain portions, and to make other portions more definite and certain. These several motions were in a large part denied, and the rulings of the court are assigned as error. Motions of this kind are addressed to the sound discretion of the trial court, and we see nothing in the complaint or in the subsequent proceedings at the trial to indicate that this discretion was abused, or that the appellants were injured or prejudiced in the slightest degree by any of the rulings complained of. Error is assigned in the overruling of a demurrer to the complaint, in the denial of a motion for nonsuit at the close of the respondent's case, and in the denial of a motion for a directed verdict or judgment at the close of all the testimony. These several rulings involve the same general question and may be considered together. It seems to us that the complaint contains all the essential elements of a cause of action. It sets forth the representations made; that they related to existing material

Mar. 1909]

Opinion Per RUDKIN, C. J.

facts; that they were false; that the appellants knew of their falsity and intended thereby to deceive and defraud the respondent; that the respondent was ignorant of the falsity of the representations made, and believed them to be true, and that the respondent acted upon them to his damage. *Tacoma v. Tacoma Light & Water Co.*, 17 Wash. 458, 50 Pac. 55; 20 Cyc. 90.

The contention that representations as to solvency relate to mere matters of opinion and are not actionable is untenable.

"A representation as to a third person's solvency and credit must be an assertion implying knowledge, not a mere expression of opinion, although an intentionally false opinion may be actionable. But the question whether a representation as to a third person's financial ability is a statement of fact or an expression of opinion is recognized as being one of peculiar difficulty, and as its solution depends upon the circumstances as well as upon the nature of the statement and the meaning of the language used, it is in the first instance to be determined by the jury. In the earlier cases the courts construed as mere expressions of opinion statements which the court now would doubtless regard as representations of fact." 20 Cyc. 75.

This is especially true of this case where the appellant Cissna was familiar with the affairs of the American Mill & Timber Company down to the smallest detail.

The further contention that the respondent was guilty of negligence in relying upon the representations made, and that he should have ascertained the financial condition of the American Mill & Timber Company from other sources or upon independent investigation, is equally unsound.

"The rule imposing upon a purchaser the duty to investigate as to the truth of his vendor's statements concerning the property to be sold has no application to representations made by a third person as to the credit, solvency, etc., of another. In cases of this character the position of the parties is not antagonistic but somewhat confidential. Therefore if defendant's representation was of such a character,

and was made under such circumstances as to justify its belief by a reasonably prudent man, plaintiff being ignorant of the truth and acting upon the representation to his injury, a recovery may be had, although plaintiff might, by the exercise of diligence, have ascertained the insolvency of the person recommended; and defendant will not be heard to say that he is a person on whose word plaintiff had no right to rely." 20 Cyc. 77.

We are also of the opinion that the testimony was sufficient to sustain the verdict and judgment as against the appellant Cissna. It tended to sustain every material allegation of the complaint. The sufficiency of the proof on the question of insolvency is challenged, but the testimony showed the financial standing of the American Mill & Timber Company to be far different from what it was represented. At the time the representations were made the company's assets consisted of the optional agreement to purchase the mill property and timber lands, under which only \$5,000 of the total purchase price of \$18,000 had been paid. The agreement was subject to forfeiture unless the mill was operated and \$500 per month paid on the purchase price. The stockholders were insolvent and could make no further payments on their stock subscriptions. Such a corporation is not necessarily solvent, is not good for one hundred cents on the dollar, and has not a mill and timber lands and \$20,000 at its back.

As to the appellant bank, the motion for a nonsuit and for a directed verdict or judgment should have been granted. The respondent was referred to the appellant Cissna and not the bank; he went to the appellant Cissna and not to the bank, and the representations were made by the appellant Cissna and not by the bank. The only attempt the respondent makes to sustain his judgment against the bank is by a reference to the amended complaint, which alleged that at all the times therein mentioned the appellant Cissna was acting for the bank in his official capacity, coupled with the statement that this allegation was not denied. In this

Mar. 1909]

Opinion Per RUDKIN, C. J.

the respondent is in error. The allegation in question was denied in each of the answers, and no attempt was made to sustain it by proof. To uphold the judgment against the bank on such a record would be an unheard of application of the doctrine of *respondeat superior*.

The appellants assign error in the giving of the following instruction on the measure of damages:

"I called you back, gentlemen of the jury, for the purpose of emphasizing, or, rather, for the purpose of repeating and possibly correcting an instruction I gave you with reference to the measure of damages. If you find for the plaintiff you will find for such an amount or sum as was earned under the contract by the plaintiff for the logs which he delivered, which were taken off the land which was purchased from the Home Security Savings Bank. Also for such amount as was reasonably expended in the construction and erection of skid roads upon the land, and also for the necessary moving of the donkey engines; all these amounts will be based upon testimony which was offered and admitted."

In support of this assignment the appellants contend that the measure of damages in this class of actions is the actual loss sustained by the plaintiff, which would of necessity exclude any claim for profits. The respondent contends that the instruction complained of is in harmony with that rule, inasmuch as the contract price for hauling and delivering logs was presumptively the reasonable value of the services performed in that connection. Whatever may be said of this latter contention as one of general application, it cannot prevail in this case, for obvious reasons. The \$4 and \$4.50 per thousand for hauling and delivering logs included all incidental expenses, such as building and repairing skid roads, moving donkey engines, etc. Had the respondent fully performed his contract and received payment for all logs delivered at the contract rate, he would likewise have received payment for building and repairing skid roads, moving donkey engines, and all other expenses incident to

his contract; and, when the court below allowed him the expense of building and repairing skid roads and moving donkey engines, and the full contract price for hauling and delivering logs, it allowed him double damages. We are not unmindful of the fact that two different rules of damages are sanctioned by the authorities in this class of actions. Under one rule the party guilty of the fraud is chargeable with such damages as naturally and proximately result therefrom. He must make good his representations as though he had given a warranty to that effect. He must make compensation for the difference between the real state of the case and what it was represented to be. Under the other rule damages are limited to the actual loss sustained by the party, such as money paid out with interest, and other outlays resulting from the wrong. *Sutherland, Damages*, §§ 1171-1172; 20 Cyc. 130-135. We do not deem it necessary to discuss these different rules or determine which is preferable, as the case was heard in the court below on the latter theory, and the correctness of its ruling is not before us. But the instruction complained of is incorrect under either rule, and calls for a reversal of the judgment.

The court charged the jury, in effect, that the true test of solvency is the ability to pay one's debts as they fall due in the ordinary course of business. The appellants contend that the true test is the one prescribed by the National Bankruptcy Act; namely, a person is solvent when his assets are equal to or in excess of his liabilities. In determining the question of solvency or insolvency we are not prepared to say that the same criterion should apply in every case. The tramp who walks the streets, without a cent and without a debt, without a home and without a care, is perfectly solvent, within the purview of the National Bankruptcy Act, but manifestly such a state of solvency does not meet the requirements of this case. The respondent was about to enter into a contract with the American Mill & Timber Company of considerable magnitude, and he applied to the ap-

Mar. 1909]

Opinion Per RUDKIN, C. J.

pellant Cissna to ascertain whether the company was solvent and able to perform its contract. Cissna was fully aware of this and stated that the company was wholly solvent, would pay one hundred cents on the dollar, etc. The representations made by Cissna went far beyond the mere question of solvency as defined by the National Bankruptcy Act, and we think that character of solvency which permits one to discharge his obligations as they fall due in the ordinary course of business is the proper test in cases of this kind.

The court further instructed the jury that the fact that the American Mill & Timber Company was insolvent in the latter part of October or the first part of November, 1905, was not of itself a presumption of insolvency on the 30th day of June, 1905, but that it was an element which the jury might take into consideration in determining the solvency or insolvency on the 30th day of June, 1905, in considering all the evidence in the case, but not to be considered as a presumption which must follow. This instruction is assigned as error. Whether in an ordinary action proof of insolvency at one date may be considered in determining the question of insolvency at an earlier date we will not inquire, for in this particular case the status of the American Mill & Timber Company on the 30th day of June, 1905, was shown in every detail, and we do not think its successes or reverses in business during the following months had anything to do with the question at issue, and the instruction should not have been given.

There are a great many other errors assigned in the rulings of the court in the admission and exclusion of testimony, and in giving and refusing instructions, but these questions may not arise on a retrial and are not of sufficient importance to call for special consideration at this time. We might say, however, in view of a retrial, that too much importance seems to have been given during the trial to matters that transpired long after the representations complained of were made. The representations were false when

made, if false at all, and if the respondent relied upon them to his injury and all the essential elements of a cause of action were made out, what transpired thereafter would seem to be of no moment, except in so far as it tended to show the nature and extent of the respondent's injury.

The judgment of the court below is reversed, with directions to dismiss the action as to the appellant bank, and to award a new trial as to the appellant Cissna.

FULLERTON, CROW, DUNBAR, and MOUNT, JJ., concur.

GOSE and CHADWICK, JJ., took no part.

[No. 7607. Decided March 9, 1909.]

PUGET SOUND IMPROVEMENT COMPANY, *Respondent*, v.
FRANKFORT MARINE, ACCIDENT & PLATE GLASS
INSURANCE COMPANY, *Appellant*.¹

INSURANCE—INDEMNITY INSURANCE—POLICY—LIMIT OF LIABILITY—COSTS OF SUIT—WHAT INCLUDED—INTEREST—CONTRACT—CONSTRUCTION. Under a policy of accident indemnity insurance which limited the liability of the company for a death loss, on the assured's premises or adjacent sidewalks, to the sum of \$5,000, and stipulated that the company would defend any suit against the assured "at its own cost," the company is only liable for \$5,000 of a judgment obtained by a city against the assured, after a recovery against the city for the death of a person on the adjacent sidewalk, together with interest and all costs incurred by the assured in defending the suit brought by the city; and it is error to include costs incurred by the city on the defense of the original action against the city, with accumulated interest.

SAME—INDEMNITY—ACCRUAL OF RIGHT OF ACTION—INTEREST. A policy of indemnity insurance covering losses from accidents on the assured's premises is a contract of indemnity against loss and not against liability merely, and no right of action, or right to interest on the loss, accrues until the assured has actually paid the judgment rendered against it.

TENDER—INTEREST. After sufficient tender of an amount due on an indemnity contract, interest does not run on the sum due.

¹Reported in 100 Pac. 190

Mar. 1909]

Opinion Per RUDKIN, C. J.

Appeal from a judgment of the superior court for King county, Griffin, J., entered May 5, 1908, in favor of the plaintiff, after a trial before the court upon stipulated facts, in an action upon an indemnity insurance policy. Reversed.

Roberts & Hulbert, for appellant.

Peters & Powell, for respondent.

RUDKIN, C. J.—Some time during the month of June, 1901, the defendant executed and delivered to the plaintiff its certain indemnity insurance policy, whereby it agreed to indemnify the plaintiff for the period of one year from the date of the policy against loss from common law or statutory liability, for damages on account of bodily injury, fatal or non-fatal, accidentally suffered within the period of the policy, by any person or persons while within the building premises of the plaintiff, situate at the southeast corner of Second avenue and Columbia street, in the city of Seattle, or upon the sidewalks or other ways immediately adjacent thereto. The policy contained the following stipulations and conditions, among others:

“A. The company’s liability for an accident resulting in injuries to or in the death of one person, is limited to \$5,000, and subject to the same limit for each person, total liability for any one accident resulting in injuries to or in the death of several persons is limited to \$10,000.”

“(1) The assured upon the occurrence of an accident shall give immediate written notice thereof, with the fullest information obtainable at the time, to the general managers of the company, for the United States of America, or to its duly authorized local agent. He shall give like notice, with full particulars of any claim that may be made on account of such accident, and shall at all times render the company all co-operation and assistance in his power.

“(2) If, thereafter, any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, the assured shall immediately forward to the general manager of the company for the United States of America, or to its duly authorized local

agent, every summons or other process or paper, as soon as the same shall have been served on him, and the company will, at its own cost, defend against such proceedings in the name and on behalf of the assured, or settle the same, unless it shall elect to pay to the assured the indemnity provided for in clause A of special agreements, as limited therein.

"(3) The assured shall not settle any claim, except at his own cost, nor incur any expense nor interfere in any of the negotiations for settlement or in any legal proceeding, without the consent of the company previously given, in writing; but he may provide at the time of the accident such immediate surgical relief as is imperative. The assured when requested by the company shall aid in securing information, evidence and the attendance of witnesses, and in effecting settlements, and in prosecuting appeals, and in case the company requires the attendance of any employee or employees of the assured, as witnesses at inquests, or in suits, the assured will secure his or their attendance, making no charge for his or their loss of time."

"(7) No action shall lie against the company as respects any loss under this policy, unless it shall be brought by the assured himself, to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment, after trial of the issue. No such action shall lie unless brought within the period within which a claimant might sue, the assured for damages, unless at the expiration of such period there is such an action pending against the assured; in which case an action may be brought against the company by the assured, within sixty days after final judgment has been rendered and satisfied as above. The company does not prejudice by this clause any defense to such action which it may be entitled to make under this policy."

On the 11th day of February, 1902, one Christiana D. Smith suffered bodily injury by slipping on the hinge of an iron door in the sidewalk adjacent to the building described in the policy, and instituted an action against the city of Seattle to recover damages for the injury thus sustained. The city notified the plaintiff herein of the commencement and pendency of the action, and demanded that it appear and defend or be bound by the judgment rendered. The

plaintiff in turn notified the defendant company, but neither the plaintiff nor the defendant in the present action appeared in or defended the action against the city. The plaintiff in the last-mentioned action recovered judgment against the city in the sum of \$7,633 and costs, which was affirmed by this court on appeal. *Smith v. Seattle*, 33 Wash. 481, 74 Pac. 674. On the 23d day of December, 1903, the city paid the judgment, amounting to the sum of \$8,151.91 in all, and, in addition thereto, necessarily paid out and expended the sum of \$500 in defending the action and prosecuting the appeal therein. The city then demanded payment of the amount of the judgment from the plaintiff in this action, and the plaintiff notified the defendant of such demand, but the defendant elected to litigate the question of liability with the city and the demand was not complied with. Suit was thereupon instituted and the city recovered judgment against the plaintiff herein in the superior court, and the judgment was affirmed by this court on appeal. *Seattle v. Puget Sound Imp. Co.*, 47 Wash. 22, 91 Pac. 255. The plaintiff paid the judgment, amounting to the sum of \$10,555.75, and instituted the present action on the indemnity policy. The defendant paid all court costs of the plaintiff in the action prosecuted against it by the city, except its attorney fees, and tendered to the plaintiff the sum of \$5,000 before this action was commenced. The tender was refused and the money was paid into court.

The foregoing facts were stipulated in the court below, and upon them the plaintiff contended, and now contends, that of the original judgment of \$8,155.91 paid by the city, the defendant was liable for the sum of \$5,000, and the plaintiff for the residue or \$3,151.91; that the defendant agreed to defend the action in the name of the plaintiff at its own costs, and that, therefore, the defendant should pay all costs of the action, including all accumulations of interest. In other words, that the plaintiff is still liable for \$3,151.91 of the judgment and the defendant should pay the balance of the

\$10,555.75, or \$7,403.84. The defendant contends, on the other hand, that when it paid all court costs of the plaintiff in the action prosecuted by the city, and tendered and paid into court the sum of \$5,000, it fully satisfied the terms and conditions of its contract with the plaintiff and should be discharged from further liability. The court below adopted plaintiff's view of the law in construing the contract, and gave judgment accordingly. From that judgment, the defendant has appealed.

The liability of the appellant is fixed by the terms of its contract, and the terms of that contract, if plain and free from ambiguity, must control. What did the appellant agree to do? First, that if an action was commenced against the assured to recover damages on account of an accident covered by the policy it would defend against such proceedings, at its own cost, in the name and on behalf of the assured, or settle the same, unless it should elect to pay the assured the indemnity provided for; and second, that it would pay the sum of \$5,000 to reimburse the assured for loss actually sustained and paid in satisfaction of a judgment after trial of the issue. It seems to us that if the appellant should pay all costs of the action prosecuted against the assured by the city and should likewise pay or tender the sum of \$5,000, as soon as the assured paid a sum equal to or in excess of that amount in satisfaction of a judgment rendered after trial of the issue, it has fully complied with and performed all the terms and conditions of its contract. This question was fully considered by the Supreme Judicial court of Maine in *Rumford Falls Paper Co. v. Fidelity & Casualty Co.*, 92 Maine 574, 43 Atl. 503, where a similar contract was construed, and in defining the meaning of the term "defend at its own cost," the court said:

"It was undoubtedly in contemplation of these things that the policy in suit was devised with a view to an apportionment of the responsibility between the insurer and the insured. Whether the interests of the assured are in all respects suffi-

Mar. 1909]

Opinion Per RUDKIN, C. J.

ciently guarded by the stipulations in the contract, it is unnecessary to consider. These corporations had the same right that individuals have to make their own contract. The court has no power to add to it or take from it. The function of the court is to interpret it, not to make it. The first article in the policy declares that the defendant 'company's liability for an accident resulting in injuries to or the death of one person is limited to fifteen hundred dollars.' This language is clear and unambiguous, and would seem to be susceptible of only one interpretation. It measures the amount of the insurance and limits the risk of the defendant company in case of accident and injury to one person. There is no other stipulation in the policy which is inconsistent with it. The agreement in article 3 simply requires the defendant company to defend 'any legal proceedings' at 'its own cost,' in the event that it elects not to pay the \$1,500 or accept any offer of settlement. It may be conceded that the word 'cost' is here used in the same relative sense as in the succeeding article in the policy, where the assured is prohibited from settling any claim 'except at his own cost.' What it will cost to settle a claim is obviously the sum required to pay it. What it will cost to defend a lawsuit is the amount required to pay the fees of counsel and witnesses, and other expenses involved in presenting the defense, including the taxable costs recovered by the plaintiff in that suit, if the defense is unsuccessful. What it will cost to make a defense to the suit is one thing. What it will cost to settle the judgment that may be recovered is another and a different thing. In each of these articles in the policy it is only the precise thing specified, and no more, than is to be done by the policy 'at his own cost.' The defendant company nowhere agrees to settle any judgment, or to indemnify the assured against any judgment that may be recovered against it, beyond the specified limit of \$1,500 and the cost of defending the suit. This is clearly the contract which the parties made, and the one which they are entitled to have enforced according to its terms.

"The conclusion therefore is that the Rumford Falls Paper Company is entitled to recover in this action against the Fidelity & Casualty Company the sum of \$1,500, the amount of insurance specified in the policy, with interest thereon from

February 21, 1896, the time when the verdict was rendered in the action, *Sawyer v. Rumford Falls Paper Company*, and the cost recovered in that action, taxed at \$62.72, with interest thereon from July 14, 1897, the time when the execution for the damages and costs in that action was paid by the plaintiff company."

The reasoning of the court in the foregoing opinion is to our minds conclusive of the questions involved on this appeal. Counsel for respondent cite a number of cases which they claim are directly in point and establish a different rule, but we do not so read them. In *Cudahy Packing Co. v. New Amsterdam Casualty Co.*, 132 Fed. 623, "The Casualty Company incurred and paid in making defense \$679.15, which it insists shall be deducted from the \$5,000, while the packing company insists it is entitled to the sum of \$167.30, its expenses, and \$5,000 with interest from the date of the judgment." The court held that the Casualty Company was not entitled to deduct the expenses incurred in defense of the action from the amount of the stipulated indemnity, and that the assured was entitled to the full sum of \$5,000, with interest from the date of the judgment, together with expenses incurred. In *New Amsterdam Casualty Co. v. Cumberland Tel. etc. Co.*, 152 Fed. 961, the trial court gave judgment for the full amount of the stipulated indemnity and a portion of the costs incurred, and this judgment was affirmed on appeal. The effect of these decisions is well stated in a note to the report of the latter case in 12 L. R. A. (N. S.) 479, as follows:

"Policies of indemnity insurance against liability for personal injuries to others usually provide, as did the one sued upon in the above case, that the insurer's liability shall be limited to a certain amount, and that, when suit is brought against the assured for such injury, the insurer shall be notified, and shall have full charge of the case; which shall be defended by its own counsel, and which can be settled only with its consent. When an injured person has recovered against the assured, in such a policy, damages to an amount equaling or exceeding the sum limited in the policy, the weight

Mar. 1909]

Opinion Per RUDKIN, C. J.

of authority supports the rule that, in actions upon such policies, the assured may recover all expenses of litigation that he may have incurred in the defense of the suit, in addition to the full amount expressed in the policy; and that, if the insurer has incurred any expenses in defending the suit for the assured, he will not be permitted to have the same deducted."

To the same effect see *Stephens v. Pennsylvania Casualty Co.*, 135 Mich. 189, 97 N. W. 686; *Travelers Ins. Co. v. Henderson Cotton Mills*, 120 Ky. 218, 85 S. W. 1090, 117 Am. St. 585.

All these cases involved either a question of costs or a question of interest on the amount the Casualty Company agreed to pay, in the event of loss or damage. In *Globe Navigation Co. v. Maryland Casualty Co.*, 39 Wash. 299, 81 Pac. 826, the amount of the recovery against the assured was less than the amount of the stipulated insurance, so that the contract of indemnity was in effect a general and unlimited one, and the same is true of the other cases cited.

In this case, it will be observed, the court gave judgment for all costs, including the \$500 expended by the city in defending the original action, and for interest not only on the amount the appellant agreed to pay from a date long anterior to the time its liability became fixed under the terms of its contract, but on the amount for which the respondent was liable as well. Under no conceivable view of the contract or the law could the appellant be held liable for more than the sum of \$5,000 with interest and costs, and the only room for construction is as to what is included in these terms. For the \$5,000 it is confessedly liable, and this much is conceded. For the entire costs of the action prosecuted against the assured by the city, we think it is also liable under its contract. It only remains to consider the question of interest. Inasmuch as the contract in suit was one of indemnity against loss and not against liability merely, there was no right of action on the contract until the assured had actually paid the judgment rendered against it, and no interest could accrue

prior to that date. *Allen v. Gilman, McNeil & Co.*, 137 Fed. 136; *Allen v. Aetna Life Ins. Co.*, 145 Fed. 881, 7 L. R. A. (N. S.) 958; *Connolly v. Bolster*, 187 Mass. 266, 72 Atl. 981; *Cushman v. Carbondale Fuel Co.*, 122 Iowa 656, 98 N. W. 509; *Frye v. Bath Gas & Electric Co.*, 97 Maine 241, 54 Atl. 395, 94 Am. St. 500, 59 L. R. A. 444; *Travelers' Ins. Co. v. Moses*, 63 N. J. Eq. 260, 49 Atl. 720, 92 Am. St. 663.

We are therefore of opinion that the respondent is entitled to recover the sum of \$5,000 and all costs incurred in the action of the *City of Seattle v. Puget Sound Improvement Company*, with legal interest on these several amounts from the date of satisfaction of that judgment; and the judgment is reversed, with directions to enter a judgment accordingly. If a sufficient tender has been made no interest will be allowed subsequent to the date of the tender.

CROW, GOSE, FULLERTON, MOUNT, DUNBAR, and CHADWICK, JJ., concur.

[No. 7742. Decided March 9, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v. E. O. SIMMONS,
Appellant.¹

RAPE—EVIDENCE—CONDUCT AT OTHER TIMES. In a prosecution for statutory rape, evidence is admissible of the prosecuting witness' conversations with accused at other times than the one upon which the state elected to rely.

EVIDENCE—HANDWRITING—IDENTIFICATION. A witness who has seen a party write and knows his handwriting is competent to identify letters written by him.

CRIMINAL LAW—APPEAL—HARMLESS ERROR—RAPE. In a prosecution for rape, the erroneous admission of evidence that defendant was married and that the prosecutrix was acquainted with his wife, is harmless.

APPEAL—HARMLESS ERROR—EVIDENCE. Error in the admission of evidence otherwise fully established is harmless.

¹Reported in 100 Pac. 269.

Mar. 1909]

Opinion Per RUDKIN, C. J.

SAME—WITNESSES—COMPETENCY. The competency of a physician who testified to the pregnancy of a prosecutrix is immaterial where the fact of pregnancy was not disputed.

SAME—HARMLESS ERROR—EVIDENCE. It is harmless error to exclude impeaching evidence as to a witness who testified to a mere negative, and to no affirmative fact prejudicial to the appellant.

EVIDENCE—HANDWRITING—INSTRUCTIONS. It is proper to refuse to instruct that a jury may not resort to a comparison of any writing not admitted by the defendant to be genuine, with any other writings not admitted by him, for the purpose of determining the genuineness of any or either of such writings.

TRIAL—INSTRUCTIONS. It is not error to refuse requested instructions covered in the general charge.

CRIMINAL LAW—TRIAL. The jury may take the exhibits to the jury room, under Bal. Code, § 5004.

RAPE—NEW TRIAL—AFFIDAVITS—SUFFICIENCY. It is not a ground for a new trial in a prosecution for rape that it is shown by affidavits that the ordinary period of gestation had elapsed since the act and the prosecutrix had not yet been delivered of her child.

NEW TRIAL—AFFIDAVIT—IMPEACHING VERDICT—EVIDENCE OF HANDWRITING. That two jurors were not satisfied with evidence of the genuineness of certain writings received in evidence until after resorting to a comparison with writings erroneously admitted, is not ground for a new trial.

SAME—INCAPACITY OF JUROR—HEARSAY. An affidavit of an attorney to the effect that a juror had become so ill as to be unable to participate in the deliberations of the jury is hearsay and insufficient as ground for a new trial.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered October 16, 1907, upon a trial and conviction of the crime of rape. Affirmed.

Slater & Allen, for appellant.

J. A. Rochford, for respondent.

RUDKIN, C. J.—The appellant was convicted of the crime of statutory rape, and from the judgment and sentence of the court, this appeal is prosecuted.

The assignments of error are twenty-five in number, but many of them are so closely associated that they may be considered together. The first, second, third, and twenty-fourth

assignments are directed against the sufficiency of the information. These assignments are not discussed in the briefs and seem to be without substantial merit. On the trial of the case the state elected to rely upon an act of sexual intercourse committed on the 10th day of January, 1907, and the fourth, fifth, sixth, and twelfth assignments of error are based on exceptions to rulings of the court permitting the prosecuting witness to testify to conversations had with the appellant at other times and dates than that upon which the state elected to rely for a conviction. There was no error in these several rulings. *State v. Wood*, 33 Wash. 290, 74 Pac. 380; *State v. Fetterly*, 33 Wash. 599, 74 Pac. 810.

The seventh, eighth, ninth, tenth, eleventh, and thirteenth assignments of error are based on exceptions to rulings of the court admitting in evidence three certain letters written by the appellant to the prosecuting witness, and permitting the prosecuting witness to testify to the handwriting of the appellant. The letters, if properly identified, were clearly admissible, and the prosecuting witness testified that she had seen the appellant write and knew his handwriting. The witness was therefore competent. *Greenleaf*, Evidence, § 577.

The fourteenth assignment is based on exceptions to the admission of testimony tending to show that the appellant was a married man, and that the prosecuting witness was acquainted with his wife. Such testimony would seem utterly irrelevant and immaterial, but the wife of the appellant was a witness in his behalf and the same matter was gone into fully by the defense, so that the ruling of the court was not prejudicial if erroneous.

The fifteenth assignment is based on exceptions to the ruling of the court admitting in evidence a certain school register kept by the appellant, and permitting a certain witness to identify the handwriting of the appellant. All matters shown by the school register were admitted to be true at every stage of the case by both the state and the accused, and the ruling of the court was not prejudicial if erroneous.

Mar. 1909]

Opinion Per RUDKIN, C. J.

The seventeenth assignment is based on exceptions to the admission in evidence of a certain letter written by the appellant to his wife and found in the cell of the city jail at Northport, which had been occupied by the appellant. This letter was sufficiently identified and was competent for the consideration of the jury.

The eighteenth assignment of error is based on the ruling of the court in favor of the competency of a certain physician, who testified that he had examined the complaining witness some months after the alleged rape and found that she was pregnant. The pregnancy of the complaining witness was not denied or disputed, and the testimony was in all respects true whether the witness was competent or incompetent.

The nineteenth assignment is based on the refusal of the court to direct a verdict of acquittal at the close of the state's case. Without going into the testimony in detail, we deem it sufficient to say that the letters and other testimony offered by the state were ample corroboration of the prosecuting witness under the act of 1907.

Romer Zimma was called as a witness for the appellant, and in response to a question, testified that he did not see the complaining witness and a third party hugging and kissing each other at a time and place specified. He was then asked the following question:

"Now, Romer, don't you remember of stating to me that at the time you saw Parrot at Johnson's, winter before last, that you saw them in the kitchen by themselves, hugging and kissing each other?"

to which an objection was sustained, and on this ruling the twentieth assignment of error is predicated. Had the witness testified to some affirmative fact prejudicial to the appellant, the ruling complained of would perhaps be erroneous. Greenleaf, Evidence, § 444. But the witness testified to a mere negative, and had he been ever so successfully impeached the only effect would be to destroy testimony which

was in itself worthless. The error was therefore harmless.

The twenty-first and twenty-second assignments are based on the refusal of the court to give two certain instructions requested by the appellant. The first request was as follows:

"You are further instructed that you are not authorized and have no right to resort to a comparison of any writing or writings which you may have with you in your jury room and which are not admitted by the defendant to be his handwriting, with any other writing which you may have with you in your jury room not admitted by the defendant to be his handwriting, for the purpose of determining whether either or any of such writing or writings was or is the handwriting of defendant."

This instruction was properly refused. Greenleaf, Evidence, § 578; *State v. Minton*, 116 Mo. 605, 22 S. W. 808. The second request was embodied in substance in the general charge of the court.

The twenty-third assignment of error is based on the ruling of the court permitting the jury to take the exhibits to their jury room. This ruling was in accordance with the statute. Bal. Code, § 5004 (P. C. § 618).

The last assignment of error is based on the ruling of the court denying a motion for a new trial. In so far as this motion was based on the exceptions already considered, it was properly denied. Certain affidavits were filed in support of the motion, and these we will consider briefly. One of the affidavits, filed some thirteen days after the close of the trial and the return of the verdict, averred that the ordinary period of gestation had elapsed between the 10th day of January, 1907, and the 13th day of October, 1907, the date of the affidavit; that the prosecuting witness had not yet been delivered of a child, and that she had stated to her friends that she had no reason to believe, and did not believe, that she would be confined within nine months from the 10th day of January. This affidavit discloses no sufficient ground for granting a new trial. The period of gestation is un-

Mar. 1909]

Opinion Per RUDKIN, C. J.

certain at best, and no effort was made by the appellant at the trial to prove the probable time of parturition. Furthermore, the fact that the prosecuting witness was pregnant was only a circumstance in the case. It was not at all necessary to sustain a conviction. Another affidavit was filed by the attorneys for the appellant, stating that they were informed by two of the jurors who sat at the trial that they were not satisfied from the testimony that the appellant had written certain letters received in evidence, that the jurors resorted to a comparison of the handwriting in said letters with the handwriting of the appellant in the school register received in evidence, and that after such comparison the jurors all treated such letters as having been written by the appellant. Aside from the fact that this affidavit is based entirely on hearsay and no excuse is shown for not producing better or more satisfactory evidence, we think the affidavit, if true, stated no ground for a new trial. Greenleaf, Evidence, § 578. A third affidavit was filed by one of the attorneys for the appellant, setting forth the following facts:

"That one Howard L. Fisk a juror duly sworn into the panel to try said cause, was, at the time of the trial and deliberation of the said jury, so ill of a fever that he was rendered thereby physically and mentally incapable of a free and full reception of the evidence and a fair deliberation of the verdict; and that his physical and mental pain and anguish during the trial of said cause was so intense that he was obliged to withdraw from an active and free interest in said deliberation and take to his bed for relief, all of which was not known to defendant or his attorney until after the trial."

This affidavit, like the former, is based entirely upon hearsay, and the source of the affiant's information was not even given. If a new trial should be granted on such a showing as this there would be no stability to verdicts and litigation would never end. After a careful examination of the record and all the assignments of error, we are satisfied that the

appellant had a fair and impartial trial, and the judgment is affirmed.

CHADWICK, GOSE, FULLERTON, CROW, MOUNT, and DUNBAR, JJ., concur.

[No. 7863. Decided March 9, 1909.]

R. W. STARR, *Respondent*, v. LONG JIM *et al.*, *Appellants*.¹

INDIANS—LANDS—ALIENATION—TREATIES—CONSTRUCTION. Under the so-called "Moses agreement" between certain Indian chiefs and the Federal government, in which the government agreed to guarantee and protect the Indians in the possession and ownership of certain lands, to be set apart to them in severalty, the title to the land, until patent issued to the Indians under a subsequent act of Congress, was in the government, in trust for the Indians, who had no power to alienate the lands; especially in view of the subsequent legislative construction by an act of Congress directing the lands "when so selected to be held for the exclusive use and occupancy of said Indians"; and Indian deeds before patent are void.

SAME—CONVEYANCE—VOID IN INCEPTION—AFTER ACQUIRED TITLE. A deed by Indians who had no power to alienate the lands, which is void in its inception because in violation of the laws of the United States, does not convey an after-acquired title by subsequent patents to the Indians, as the same do not inure to the benefit of the purchasers.

EQUITY—LACHES—RECOVERY OF REAL ESTATE—LIMITATION OF ACTIONS. Laches will not bar a recovery of lands by Indians held under void deeds, within the statutory limitation for the commencement of the action.

JUDGMENT—DEFAULT—VACATION—DISCRETION—IMPEACHMENT BY JUDGE. It is not an abuse of discretion to open a default judgment entered against Indians, and allow them to appear through the United States District Attorney to set aside fraudulent deeds; and having exercised the discretion, it is not competent for the trial judge to impeach the exercise thereof by a subsequent recital in a statement of facts to the effect that there was no sufficient excuse for the long delay in moving to open the default.

QUIETING TITLE—JUDGMENT—FORM—RESTORATION OF POSSESSION TO DEFENDANTS AND OF PURCHASE MONEY TO PLAINTIFF. In an action to quiet title to Indian lands, in the possession of the plaintiff since

¹Reported in 100 Pac. 194.

Mar. 1909]

Opinion Per RUDKIN, C. J.

1900 under a void deed, judgment setting aside the deed and restoring possession should require repayment to the plaintiff of the purchase price paid to the Indians, together with a certain attorney's fee due him which was part of the purchase price, and had since outlawed, with interest from the date of payment, and any sums paid for taxes, less any amounts or things of value received by the plaintiff for the sale, use or lease of the lands.

Appeal from a judgment of the superior court for Chelan county, Steiner, J., entered March 31, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to quiet title. Reversed.

A. G. Avery and J. B. Lindsley, for appellants.

Reeves & Reeves and R. W. Starr, for respondent.

RUDKIN, C. J.—On the 7th day of July, 1883, the Secretary of the Interior and the Commissioner of Indian Affairs, on the part of the United States, and chief Moses and other Indians of the Columbia and Colville reservations in the then Territory of Washington, entered into a certain agreement, subject to the approval of Congress, the material parts of which are as follows:

“In the conference with Chiefs Moses and Sar-sarp-kin, of the Columbia reservation, and Tonasket and Lot, of the Colville reservation, had this day, the following was substantially what was asked for by the Indians:

“Tonasket asked for a saw and grist-mill, a boarding school to be established at Bonaparte creek to accommodate one hundred (100) pupils, and physician to reside with them, and \$100 (one hundred) to himself each year.

“Sar-sarp-kin asked to be allowed to remain on the Columbia reservation with his people, where they now live, and to be protected in their rights as settlers, and in addition to the ground they now have under cultivation within the limit of the fifteen-mile strip cut off from the northern portion of the Columbia reservation, to be allowed to select enough more unoccupied land in severalty to make a total to Sar-sarp-kin of four square miles, being 2,560 acres of land, and each head of a family or male adult one square mile, or

to remove onto the Colville reservation, if they so desire; and in case they so remove, and relinquish all their claims to the Columbia reservation, he is to receive one hundred (100) head of cows for himself and people, and such farming implements as may be necessary.

"All of which the Secretary agrees they should have, and that he will ask Congress to make an appropriation to enable him to perform.

"The Secretary also agrees to ask Congress to make an appropriation to enable him to purchase for Chief Moses a sufficient number of cows to furnish each one of his band with two cows; also to give Moses one thousand dollars (1,000.00) for the purpose of erecting a dwelling house for himself; also to construct a sawmill and gristmill as soon as the same shall be required for use; also that each head of a family or each male adult person shall be furnished with one wagon, one double set of harness, one grain cradle, one plow, one harrow, one scythe, one hoe, and such other agricultural implements as may be necessary.

"And, on condition that Chief Moses and his people keep this agreement faithfully, he is to be paid in cash, in addition to all of the above, one thousand dollars (\$1,000.00) per annum during his life.

"All this on condition that Chief Moses shall remove to the Colville reservation and relinquish all claims upon the government for any land situate elsewhere.

"Further, that the government will secure to Chief Moses and his people, as well as to all other Indians who may go onto the Colville reservation and engage in farming, equal rights and protection alike with all other Indians now on the Colville reservation, and will afford him any assistance necessary to enable him to carry out the terms of this agreement on the part of himself and his people; that until he and his people are located permanently on the Colville reservation his status shall remain as now, and the police over his people shall be vested in the military, and all money or articles to be furnished him and his people shall be sent to some point in the locality of his people, there to be distributed as provided. All other Indians now living on the Columbia reservation shall be entitled to 640 acres, or one square mile, of land to each head of family or male adult, in the possession and ownership of which they shall be guaranteed and pro-

Mar. 1909]

Opinion Per RUDKIN, C. J.

tected; or, should they move onto the Colville reservation within two years, they will be provided with such farming implements as may be required, provided they surrender all rights to the Columbia reservation.

"All the foregoing is upon the condition that Congress will make an appropriation of funds necessary to accomplish the foregoing, and confirm this agreement, and also, with the understanding that Chief Moses, or any of the Indians heretofore mentioned, shall not be required to move to the Colville reservation until Congress does make such appropriation, etc."

This agreement was ratified and confirmed by the Act of Congress of July 4, 1884, 23 United States Statutes at Large, 79-80, which reads as follows:

"For the purpose of carrying into effect the agreement entered into at the city of Washington on the seventh day of July, eighteen hundred and eighty-three, between the Secretary of the Interior and the Commissioner of Indian Affairs and Chief Moses and other Indians of the Columbia and Colville reservations, in Washington Territory, which agreement is hereby accepted, ratified, and confirmed, including all expenses incident thereto, eighty-five thousand dollars, or so much thereof as may be required therefor, to be immediately available: *Provided*, That Sar-sarp-kin and the Indians now residing on said Columbia reservation shall elect within one year from the passage of this act whether they will remain upon said reservation on the terms therein stipulated, or remove to the Colville reservation: *And provided further*, That in case said Indians so elect to remain on said Columbia reservation the Secretary of the Interior shall cause the quantity of land therein stipulated to be allowed them to be selected in as compact form as possible, the same when so selected to be held for the exclusive use and occupation of said Indians, and the remainder of said reservation to be thereupon restored to the public domain, and shall be disposed of to actual settlers under the homestead laws only, except such portion thereof as may properly be subject to sale under the laws relating to the entry of timber lands and of mineral lands, the entry of which shall be governed by the laws now in force concerning the entry of such lands."

On the 11th day of August, 1894, in conformity to this agreement and the Act of Congress ratifying the same, the Secretary of the Interior set apart for the exclusive use and occupation of the defendant Long Jim a certain allotment on the Columbia reservation, a part of which is involved in this action. The act of Congress of March 3, 1905, 33 U. S. Statutes at Large, p. 1064-5, authorized the Secretary of the Interior to issue a patent to the defendant Long Jim for the land embraced in his allotment, in the following language:

"That the Secretary of the Interior be, and hereby is, authorized and directed to issue a patent in fee to Long Jim for the lands heretofore allotted to him by the Secretary of the Interior on April eleventh, eighteen hundred and ninety-four, as modified and changed by Department order of April twentieth, eighteen hundred and ninety-four, under and by virtue of the agreement concluded July seventh, eighteen and eighty-three, by and between the Secretary of the Interior and the Commissioner of Indian Affairs and Chief Moses and other Indians of the Columbia and Colville reservations, commonly known as the 'Moses agreement,' accepted, ratified, and confirmed by the Act of Congress approved July fourth, eighteen hundred and eighty-four (Twenty-third Statutes, pages seventy-nine and eighty), and under the decision of the General Land Office of July ninth, eighteen hundred and ninety-two, affirmed by the Department of the Interior January sixth, eighteen hundred and ninety-three, to wit: the northeast quarter, northeast quarter of the southeast quarter and lot one of section eleven, the northwest quarter and southwest quarter of the southwest quarter of section twelve, lot one of section fourteen, and lots one and two of section thirteen, township twenty-seven north, range twenty-two east, Willamette meridian, Washington, free of all restrictions as to sale, incumbrance, or taxation."

On August 2, 1905, a patent was issued pursuant to the authority granted by the last-mentioned act. On March 29, 1900, the defendants conveyed a portion of their allotment to the plaintiff in this action, by warranty deed, in consideration of the sum of \$2,000. The plaintiff entered into

Mar. 1909]

Opinion Per RUDKIN, C. J.

possession of the granted premises about a year after the execution of the deed, and has continued in possession ever since. This action was instituted for the purpose of quieting his title to the land described in his deed as against the claims and demands of the defendants. A judgment by default was taken against the defendants for failure to answer, but the default was afterwards opened, on motion of the defendants appearing through the United States attorney for the Eastern District of Washington, and the defendants were permitted to answer and defend, on condition that they pay \$75 as costs, and that the cause be heard and determined in the state courts, which conditions were assented to and complied with. The answer of the defendants attacked the validity of the deed under which the plaintiff claims, on the ground of fraud in its procurement, and on the further ground that the deed was void in its inception, because at the date of its execution the title to the land therein described was in the United States, and the defendants had no right, power, or authority to convey the same. The court below made findings of fact and conclusions of law in favor of the plaintiff, and gave judgment accordingly. From that judgment, the defendants have appealed.

In view of the conclusion we have reached on certain legal questions involved in the case, we deem it unnecessary to enter upon a discussion of the facts. At the time the conveyance under which the respondent claims title was executed, the United States held the title to the land sought to be conveyed, in trust for the Indian appellants, and had stipulated in the Moses agreement, and the act of Congress confirming the same, that the Indians should be guaranteed and protected in the possession and ownership thereof. How could the government guarantee and protect the Indians in the possession and ownership of the property if the Indians were at liberty to divest themselves of that ownership and possession through a voluntary conveyance? The nature of the Indian claim to these allotted lands was fully con-

sidered by the United States Circuit Court of Appeals for this Circuit in the case of *United States v. Moore*, 161 Fed. 513. It was there held that the Indian acquired a mere right of possession through the allotment, that the legal title remained in the United States until after patent, and that the United States could maintain an action of ejectment against a third person who had ousted the Indian allottee from possession. In the course of its opinion the court said:

“Looking at the agreement alone, we do not think that either party to it could have understood from its language that it was contemplated that the government was to sever its relations to such of the Indians as should remain on the Columbia reservation, any more than with those who should remove to the Colville reservation—to cease to be their guardian. On the contrary, the agreement expressly recites that the Indians were to be ‘protected’ by the government and by it guaranteed in the possession and ownership of the respective tracts of land to be set apart to them in severalty. How could the United States afford such protection but by remaining the guardian of the Indians? We think it the plain meaning of the agreement itself that it should do so, and that no party thereto could have otherwise understood. That it was to the interest of the Indians that the government should retain such title and continue as the guardian of the Indians was recognized by the learned judge of the court below, where he said in his opinion that his conclusion had ‘been reached with much reluctance, for no doubt it would be better for the Indians to sustain the plaintiff’s contention. They are not qualified to cope with the white race, and the result of this decision, should it be sustained in the higher courts, will no doubt be prejudicial to their best interests. It is to be regretted that so commendable an effort should not have been made before the agreement received the approval of Congress, or at least before the rights of purchasers had attached; but the supreme court has said that the courts are not concerned with these considerations.’

“That Congress took the same view in respect to the interest of the Indians is, we think, manifest from its confirmatory act in question, in which it provided that, should the Indians then residing on the Columbia reservation elect within the time limited in the statute (one year) to remain on that

Mar. 1909]

Opinion Per RUDKIN, C. J.

reservation, the Secretary of the Interior should cause the quantity of land, stipulated in the agreement to be allowed them, to be selected in as compact form as possible, 'the same when so selected to be held for the exclusive use and occupation of said Indians.' To be 'held' by whom? Obviously by the United States, their guardian, and to the end that they might be 'protected' against the tricks and acts of designing persons. Such act on the part of Congress was in accord with its general policy upon the subject; and that such is its true meaning finds strong support in the fact that the act was so construed by President Cleveland in his executive order of May 1, 1886, directing:

"That the tracts of land in Washington Territory surveyed for and allotted to Sar-sarp-kin and other Indians, in accordance with the provisions of said act of July 4, 1884, which allotments were approved by Acting Secretary of the Interior April 12, 1886, be, and the same are hereby set apart for the exclusive use and occupation of said Indians; the field notes of the survey of said allotments being as follows,' etc.

"It is further confirmed by the interpretation put by Congress itself upon the act of July 4, 1884, by its subsequent acts of March 3, 1905 (33 Stat. 1064, c. 1479), and of March 8, 1906 (34 Stat. 55, c. 629), providing for the conveyance of the government title by patents to certain of the allottees under the agreement and act in question. The legislative construction of its own act is always potent. 'If it can be gathered,' said the supreme court in *U. S. v. Freeman*, 3 How. 556-564, 11 L. Ed. 724, 'from a subsequent statute in *pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.' And in the case of *Philadelphia & E. R. Co. v. Catawissa R. Co.*, 53 Pa. 20, the supreme court of Pennsylvania said:

"If a contemporaneous construction by the legislature of the same words can be discovered, it is high evidence of the sense intended.'

"That the acts of July 4, 1884, of March 3, 1905, and of March 8, 1906, above referred to, are in *pari materia*, is perfectly plain, for they relate to the same subject-matter

and are parts of the same legislative purpose. In respect to such statutes, Sutherland, St. Const. 283, says:

“All consistent statutes which can stand together, though enacted at different dates, relating to the same subject, and hence briefly called statutes *in pari materia*, are treated prospectively, and construed together, as though they constituted one act. This is true, whether the acts relating to the same subject were passed at different dates, separated by long or short intervals at the same session, or on the same day. They are all to be compared, harmonized, if possible, and, if not susceptible to a construction which will make all of their provisions harmonize, they are made to operate together, so far as possible, consistently with the evident intent of the legislative enactment.”

“And in Endlich, Interpretation of Statutes, § 43, it is said:

“Where there are earlier acts relating to the same subject, the survey must extend to them; for all are, for the purposes of construction, considered as forming one homogeneous and consistent body of law, and each of which may explain and elucidate every other part of the common system to which it belongs.”

This language is utterly inconsistent with any right or authority in the Indian allottee to convey the land or divest himself of the ownership and possession before patent. The Moses agreement and the several acts of Congress relating to these Indian lands, being *in pari materia*, must be construed together, and it may well be asked why did Congress provide, five years after the conveyance under which the respondent claims, that the government patent should be free from all restrictions as to sale, encumbrance, or taxation if no such restrictions had existed prior to that time. It seems to us that there can be no question that the Moses agreement and these several acts of Congress clearly evince the long-established policy of the government to retain a guardianship over these Indians and to hold their lands in trust for them, to protect them against their ignorance and improvidence and “against the tricks and acts of designing persons.” If so, the attempt on the part of the appellants

Mar. 1909]

Opinion Per RUDKIN, C. J.

to dispose of their allotment, and the attempt on the part of the respondent to acquire the title, were alike violative of the spirit and purpose of the laws of the United States, and it is the duty of every court to declare such conveyances null and void. *Coey v. Low*, 36 Wash. 10, 77 Pac. 1077; *Melchoir v. McCarty*, 31 Wis. 252, 11 Am. Rep. 605; *Smith v. Stevens*, 10 Wall. 321, 19 L. Ed. 933.

If the deed was void in its inception because in contravention to the laws of the United States, it was void for all purposes, and cannot convey an after acquired title. As said by the court in *Atkinson v. Bell*, 18 Tex. 474:

"The rule that where a vendor has not title, and sells, any title afterwards procured by him will inure to the benefit of the purchaser, does not apply in cases where such sale was prohibited by law. Such favor shown to a purchaser at a prohibited sale would thwart and defeat the policy of the government."

See, also, *Holmes v. Johns*, 56 Texas 41; *Bank of America v. Banks*, 101 U. S. 240, 25 L. Ed. 850.

Something is said in the briefs about the question of laches, but there is nothing in this record to bar the appellants from asserting their title to these lands at any time within the period prescribed by the statute of limitations.

The respondent contends that the court abused its discretion in opening the default and admitting the appellants to defend, and in support of this contention we are referred to the following statement embodied in the certificate to the statement of facts:

"And the court further certifies at the request of the plaintiff and over the objection of defendants, exceptions to which are allowed defendants, that in the consideration and decision of the motion of defendants to vacate the original judgment, that I was convinced from the affidavits used and the showing made on said motion that there was no excuse for the defendants not appearing and defending in time or for their long delay in moving against the default thereafter, but was of the opinion that notwithstanding this, it would

be a proper matter to investigate the allegations of fraud mentioned in defendants' motion to set aside said judgment."

Why should the question of fraud be investigated if the investigation could not be made effective by the rendition of a final judgment? We think the court below acted well within its discretion in setting aside the default and permitting the appellants to answer, and it should not be permitted to impeach or undermine its previous ruling by a statement inserted in its certificate to the statement of facts months afterwards.

It only remains to consider the form of judgment to be entered after the remand of the case to the court below. The prayer for relief in the answer is as follows:

"Wherefore, these defendants pray for a judgment and decree herein that the plaintiff take nothing; that the above described lands, and each and every part thereof, are the property of, and owned by the defendants, free and clear of, and from all claim, or claims of said plaintiff, or any one claiming through or under him, and that all cloud, or clouds on said defendants' title may be removed and cleared; provided, however, that before such decree shall become of full force and effect, the defendants shall pay into court for said plaintiff the sum of fifteen hundred and twenty-five dollars (\$1,525.00) with legal interest thereon from the day on which said sum was paid by the plaintiff to said defendants, as stated in the complaint.

"That if it should be determined in said action that said plaintiff had collected or secured any money or other article, or property of value for the sale, use or lease of said real estate, or any part thereof, that these defendants have judgment against the plaintiff for the amount thereof with legal interest thereon, against which judgment the aforesaid sum of fifteen hundred and twenty-five dollars (\$1,525.00) and interest may be proportionately and properly an offset."

We think that judgment for the appellants should go as prayed, except in two particulars. If the respondent has paid any taxes levied after the land became legally subject to taxation, these should be included in the amount to be paid by the appellants, with legal interest; and we think

Mar. 1909]

Syllabus.

in equity the attorney fee of \$500, which constituted a part of the consideration for the deed, should likewise be included, with interest. The record shows that the attorney fee was justly due and owing to the respondent at the time the deed was executed; the respondent has relied upon the conveyance as a satisfaction of his claim and has taken no steps to otherwise enforce it; the claim is now barred by the statute of limitations, and the respondent is remediless unless this court interposes in his behalf, and we think that equity and good conscience require that we should do so. With this modification the judgment is reversed, with directions to enter judgment in favor of the appellants according to the prayer of their answer.

GOSE, FULLERTON, CROW, CHADWICK, MOUNT, and DUNBAR, JJ., concur.

[No. 7865. Decided March 9, 1909.]

THE STATE OF WASHINGTON, *on the Relation of Edna Mann et al., Appellant*, v. THE SUPERIOR COURT FOR THURSTON COUNTY *et al., Respondents*.¹

EXECUTORS AND ADMINISTRATORS—WILLS—PROBATE—ORDER—ENTRY—INADVERTENCE. Inadvertence in failing to enter an order of probate of record is not a valid objection to administration based on the probate of the will.

EXECUTORS AND ADMINISTRATORS — NONRESIDENT DECEDENTS — NECESSITY OF ADMINISTRATION. Upon the death of a nonresident, leaving real property in this state, there is the same necessity for administration in this state as in the case of resident decedents, regardless of proceedings in another state, as they are of no effect in this state for any purpose.

SAME—PROBATE OF FOREIGN WILL—DEBTS. Upon the probate of a foreign will, the absence of debts can only be established by notice to creditors.

SAME—RIGHT TO ADMINISTER—DISCRETION. The right to administer upon an estate is statutory, with no discretion in the court where proper application is made.

¹Reported in 100 Pac. 198.

Application for a writ of certiorari to review an order of the superior court for Thurston county, Irwin, J., entered January 18, 1909, after a hearing on the merits, denying a petition to dismiss proceedings for the probate of a will. Denied.

R. H. Frye, for relators.

Thos. M. Vance, Troy & Sturdevant, and *S. P. Richardson*, for respondents.

RUDKIN, C. J.—Edward Harkness died testate at his home in Los Angeles county, California, on the 24th day of December, 1907. He left an estate in California subject to administration, also an estate in Thurston county of this state. The property in Thurston county, with the exception of two lots devised to his daughter, was devised to his widow for life, and after her death to his two sons, share and share alike. The will was admitted to probate in the superior court of Los Angeles county, California, and the widow was appointed administratrix with the will annexed. The California estate is now in process of administration there. A copy of the will and of the original record of probate, authenticated by the attestation of the clerk of the court in which probate was made, was filed in the superior court of Thurston county. The will was admitted to probate and one Walter Crosby was appointed administrator with the will annexed, at the instance and request of the widow of the deceased. On the 13th day of January, 1909, the devisees named in the will, other than the widow, appeared specially in the court below and moved the court to dismiss the probate proceedings instituted here, on substantially two grounds; first, because the foreign will was never admitted to probate; and second, because there was no necessity for administration in this state. The petition was denied, and the petitioner thereupon applied to this court for a writ of review to review the action of the superior court in denying the motion to dismiss. The case is now before us on the return to the order to show

Mar. 1909]

Opinion Per RUDKIN, C. J.

cause why the writ should not issue as prayed. The return shows that the will was in fact admitted to probate in the court below, but through inadvertence the order of probate was not entered. The first assignment of error is therefore untenable. Nor does it appear that there is no necessity for administration in this state. The California court has no jurisdiction over the real property of the decedent having its situs in this state, and the proceedings in that court will not bar the claims of creditors residing in this state, if any such there be, in so far as the property in this state is concerned. Bal. Code, §§ 6120, 6121 (P. C. §§ 2410, 2411), provide as follows:

"Sec. 6120. Wills probated in any other state or territory of the United States, or in any foreign country or state, shall be admitted to probate in this state on the production of a copy of such will and of the original record of probate thereof, authenticated by the attestation of the clerk of the court in which such probate was made; or if there be no clerk, by the attestation of the judge thereof, and by the seal of office of such officers, if they have a seal."

"Sec. 6121. All provisions of the law relating to the carrying into effect of domestic wills after probate shall, so far as applicable, apply to foreign wills admitted to probate in this state, as contemplated in the preceding section."

Section 6125 (P. C. § 2417), provides that:

"After probate of any will letters testamentary shall be granted to the persons therein appointed executors. If a part of the persons thus appointed refuse to act, or be disqualified, the letters shall be granted to the other persons appointed therein. If all such persons refuse to act, letters of administration with the will annexed shall be granted to the person to whom administration would have been granted if there had been no will."

Section 6141 (P. C. § 2433), provides that administration of the estate of a person dying intestate shall be granted to the surviving husband or wife, or such person as he or she may request to have appointed. Under these sections there is the same necessity for the appointment of an administrator

to carry out the provisions of a foreign will as exists in the case of a domestic will. In other words, the same necessity for administration existed in this state as would have existed had the testator lived and died here. The fact that the testator lived and died in another jurisdiction, or the fact that he left property in another jurisdiction, or the fact that administration proceedings are pending in another jurisdiction, has nothing whatever to do with the necessity for administration in this state upon real property situated in this state. One of the purposes of administration is the payment of the debts of the deceased and the barring of claims against the estate. A mere statement or affidavit that there are no such claims cannot establish that fact. Such fact can only be judicially established by due course of administration. If the will of the testator had first been admitted to probate in this state and the widow applied for letters of administration upon the estate, we apprehend that the heirs or devisees could not defeat her right by asserting that there were no debts against the estate and no necessity for administration.

We held in *State ex rel. Speckart v. Superior Court*, 48 Wash. 141, 92 Pac. 942, and other cases, that there was no necessity for administration where the estate had already become vested in the heirs or devisees, and where all possible claims against the estate had been paid or were barred by the statute of limitations, but the rule established by these decisions does not extend to a case of this kind. The right to administer upon an estate is a statutory one, and where application is seasonably made by one of the parties designated by the statute, the court has no discretion in the matter. The application for the writ is accordingly denied.

FULLERTON, GOSE. CROW, MOUNT, DUNBAR, and CHADWICK, JJ., concur.

Mar. 1909]

Opinion Per MOUNT, J.

[No. 7803. Decided March 9, 1909.]

J. ELBERT WILLIAMS, *Respondent*, v. C. A. BARTZ *et al.*,
Appellants.¹

APPEAL—REVIEW—VERDICT. After the refusal of a new trial below, the supreme court cannot set aside the verdict of a jury because against the preponderance of the testimony, if it is supported by substantial evidence, although it be but the evidence of a single interested witness.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered June 8, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

J. R. Buxton and Dysart & Ellsbury, for appellants.

L. H. Schellbach and B. H. Rhodes, for respondent.

MOUNT, J.—This action was brought to recover upon an alleged contract for wages. The defendants denied the contract and alleged a counterclaim for damages. The cause was tried to the court and a jury. A verdict was returned in favor of the plaintiff. Defendants' motion for a new trial was denied, and a judgment was entered upon the verdict. The defendants have appealed.

But two errors are assigned; that the court erred (1) in denying defendants' motion for a new trial, and (2) in entering the judgment appealed from. The errors are both based upon the contention that the evidence is not sufficient to sustain the verdict. It is not claimed that there was no evidence to support the verdict, but appellants contend that the verdict is based upon the evidence of the respondent only. Conceding this to be true, this court has held that,

"If there is substantial evidence in the record sustaining the verdict and judgment, though it be but the evidence of one witness and that witness the person in whose favor the verdict and judgment is rendered, we have no rightful power to reverse the judgment for want of facts, no matter how

¹Reported in 100 Pac. 186.

strongly we may be convinced that the evidence preponderates with the other side. On this question, therefore, the appellant is concluded by the finding of the jury." *Stanley v. Stanley*, 32 Wash. 489, 73 Pac. 596.

We have often held that, where there is a conflict of evidence, and the jury have passed upon the credibility of the witnesses and found a verdict, and the trial court afterwards denies a motion for a new trial and enters judgment thereon, such judgment is conclusive, except perhaps where there is an abuse of discretion in the lower court. *Warwick v. Hitchings*, 50 Wash. 140, 96 Pac. 960; *Ottomeier v. Hornburg*, 50 Wash. 316, 97 Pac. 235; *Farrel Co. v. Ihrig*, 50 Wash. 281, 97 Pac. 52; *Strandell v. Moran*, 49 Wash. 533, 95 Pac. 1106; *Suell v. Jones*, 49 Wash. 582, 96 Pac. 4; *Wilcox v. Watson*, 49 Wash. 215, 94 Pac. 1135.

This rule is conclusive of the case. There is no error in the record, and the judgment must be affirmed.

RUDKIN, C. J., FULLERTON, CROW, and CHADWICK, JJ., concur.

DUNBAR and GOSE, JJ., took no part.

[No. 7722. Decided March 9, 1909.]

D. D. MCPHEE *et al.*, Appellants, v. UNITED STATES
FIDELITY AND GUARANTY COMPANY *et al.*,
Respondents.¹

SHERIFFS—NEGLECT OF DUTY—ESCAPE OF PRISONERS—OFFICIAL BONDS—LIABILITY TO PERSONS ENTITLED TO REWARD. A sheriff is not liable on his official bond to parties entitled to a reward for the capture of criminals, turned over to him, for damages suffered by the escape of the prisoners, under the conditions of his official bond to "well, truly, and faithfully perform all of his duties as sheriff," and of the statute giving a right of action on the bond in favor of all persons injured or aggrieved by his wrongful act or default; since the duty to keep the prisoners is not direct, or to the plaintiffs, but to the public, and damages recoverable on the

¹Reported in 100 Pac. 174.

Mar. 1909]

Opinion Per CHADWICK, J.

bond must be measured by the wrongful act itself and not by loss of profits anticipated under an independent contract between third parties.

Appeal from an order of the superior court for Spokane county, Sullivan, J., entered June 9, 1908, upon sustaining a demurrer to the complaint, dismissing an action for damages. Affirmed.

Macdonald & Reiter and *H. M. Brooks*, for appellants.

Happy & Hindman and *Gunn & Rasch*, for respondents.

CHADWICK, J.—This action was begun by plaintiffs to recover damages. It was alleged in the complaint, that plaintiffs had effected the capture of one Ed. McDonald and one George Frankhauser, who had on the 12th day of September, 1907, unlawfully and feloniously stopped and robbed a mail and passenger train operated by the Great Northern Railway Company, from which valuable packages containing approximately the sum of \$40,000 in lawful money of the United States had been taken; that rewards for the arrest and conviction of each of the guilty persons were offered, by the United States of America in the sum of \$1,000, the Great Northern Railway Company in the sum of \$5,000, and the Marine Insurance Company of London, a corporation, in the sum of \$1,000; said rewards aggregating the sum of \$14,000.

It is further alleged, that plaintiffs captured and turned over to the United States marshal for Montana, and he, under an order issued by the United States district court for the district of Montana, in turn delivered, each of the guilty parties to defendant Shoemaker as sheriff of Lewis and Clark county, in the state of Montana, for their safe keeping in the county jail of said county; that plaintiffs were possessed of "information, facts, and material and competent evidence" sufficient to secure the conviction of the said McDonald and Frankhauser, and each of them; that the defendant Shoemaker did not "well, truly, or faithfully per-

form his duties" as sheriff by safely keeping the said prisoners, but carelessly, negligently, and unfaithfully suffered and permitted them to escape from the jail in which he had confined them, and that they have been ever since, and now are, fugitives from justice; that plaintiffs have been damaged in the sum of \$14,000 by reason of his negligence. The United States Fidelity & Guaranty Company, a corporation, surety upon the sheriff's official bond, was joined as defendant.

The condition of the sheriff's bond was that he would "well, truly, and faithfully perform all of his duties as such sheriff." Section 1064 of the Political Code of Montana pertains to official bonds and provides that such bonds shall be, "in force and obligatory upon the principal and sureties therein to and for the state of Montana and to and for the use and benefit of all persons who may be injured or aggrieved by the wrongful act or default of such officer in his official capacity." It also provides that "any person so injured or aggrieved may bring suit on such bond in his own name without any assignment thereof." A general demurrer was interposed to the complaint and sustained by the court below. From an order dismissing plaintiffs' action, they have appealed.

The prisoners were properly turned over to respondent Shoemaker, as sheriff of Lewis and Clark county, Montana, and that it was his official duty to safely keep them must be conceded. The only question before us is whether he is responsible to appellants under his official bond, the conditions of which, together with the statute amplifying them, have been hereinbefore quoted. It is a fundamental principle that the obligation of an official bond will not be extended by construction beyond its expressed terms, but will be considered by the court according to its true intent and meaning. 25 Am. & Eng. Ency. Law (2d ed.), 723. A sheriff owes a two-fold duty; one to the public, and one to private individuals who are concerned in the execution of civil and quasi civil process. He is liable upon his official bond for a breach

Mar. 1909]

Opinion Per CHADWICK, J.

of such duty. But the duty in either event must be direct; the cause of action must result to the party injured; it must operate as a deprivation of an existing right. Whatever contracts may be assumed by or between third persons can be made as between themselves to depend directly or incidentally upon the act of a public officer, but we know of no rule that would make the officer liable to pay a damage to such third person, although the loss was occasioned by his wrongful act or default. In the case at bar third parties had promised to pay rewards in the event of the arrest and conviction of certain train robbers. Acting upon this offer, appellants undertook to, and did, arrest the guilty parties. They were turned over to respondent Shoemaker for safe-keeping, and escaped. Shoemaker was not a party to the contract and owed no duty to either party to it, either to receive the prisoners or to keep them safely. The chance of an escape might be denominated a hazard of the contract. His whole duty was to the public and to the prisoners. The general rule is that a sheriff is never liable at the suit of third persons, unless expressly bound by the duty of his office. *Strong v. Campbell*, 11 Barb. 135; *Harrington v. Ward*, 9 Mass. 251; *South v. Maryland*, 18 How. 396, 15 L. Ed. 433; *Hullinger v. Worrell*, 83 Ill. 220; *State, Use of Cocking v. Wade*, 87 Md. 529, 40 Atl. 104.

To this rule one exception has sometimes been declared; that is, that he owes a duty to his prisoner to keep him in health and free from harm; and for any breach of such duty resulting in death or injury he is liable to the prisoner, or if he be dead, to those entitled to recover for his wrongful death. But his survivors could not maintain the action unless the deceased, if alive, could have maintained an action on the case. *State ex rel. Tyler v. Gobin*, 94 Fed. 48; *Asher v. Cabell*, 50 Fed. 818.

We have searched the books in vain for authorities upon the concrete question whether a party who was entitled to a reward could recover against a sheriff on his bond for

damages suffered by the escape of the prisoner, and must therefore look at the general principles of the law for guidance.

The liability of a sheriff who suffers or permits one to escape who has been arrested on mesne or final process, to be held pending the satisfaction of a debt or judgment, is not to be confused with the case before us. A sheriff has been held liable in instances so arising, upon the theory that the body of the debtor stands in lieu of the debt, whether the incarceration be for a fixed term or continued pending satisfaction or payment.

Appellants' principal reliance is upon the following cases: *Asher v. Cabell*, *supra*; *Appeal of Jenkins*, 25 Ind. App. 532, 58 N. E. 560; *Tennessee v. Hill*, 60 Fed. 1005, 24 L. R. A. 170; *McPeck v. Western Union Tel. Co.*, 107 Iowa 356, 78 N. W. 63, 70 Am. St. 205, 43 L. R. A. 214. In the case of *Asher v. Cabell* a surviving widow was permitted to sustain an action against the United States marshal for the wrongful death of her husband, who had been taken from his custody by a mob, and by it slain. The case was sustained upon the theory that it was the duty of the marshal to safely keep and protect his prisoner. The liability grew out of the personal obligation which was within the intent and meaning of his bond. The negligent performance of his duty to deceased created a right of action. In the case at bar, respondent Shoemaker owed no official duty to appellants. The case of *Jenkins* was in its facts on all fours with the case of *Asher v. Cabell*, which the court cited and relied upon as authority. The case of *Tennessee v. Hill* was a suit by the public, the state of Tennessee, and is not on that account an authority here; for it cannot be denied that the public could recover the expenses incurred upon recapture of a prisoner negligently permitted to escape by the officer having his custody. In *McPeck v. Western Union Tel. Co.*, the company failed to deliver a message which, if delivered in time, would have resulted in the arrest of a criminal and the re-

Mar. 1909]

Opinion Per CHADWICK, J.

covery of a reward by the plaintiff. The court held the company to account. While the soundness of the decision may well be questioned on account of the remoteness of the damages sustained, yet admitting its value, it can be readily distinguished from the case at bar. When the company undertook to transmit the message, it impliedly promised to act promptly, and became liable to the sender for a breach of such duty. The obligation was direct. But the case is not controlling here for the reason that there was no duty, either express or implied, on the part of Shoemaker to keep the prisoners for appellants. His duty was to keep them for the public, and produce them for trial.

Other cases cited by appellants are in themselves correct expressions of the law when applied to the facts involved, but they are not in point. The underlying principle in all the cases is that all recoveries against a public officer on his bond for the involuntary escape of a prisoner are limited to actual damages, damages arising out of and to be measured by the wrongful act itself; and while there may be no authority for it, we may add—for principle sanctions it,—that damages can in no case be measured by losses incurred or profits anticipated under an independent contract between third parties, although the performance of the contract depends upon the conduct of the officer. That part of the statute of Montana, “for the use and benefit of persons who may be injured or aggrieved,” cited and relied upon by appellants, must be read in connection with the conditions of the bond, and when so considered it must be held to refer only to such liabilities as arise within the fair intendment and meaning of the obligation itself.

The judgment of the lower court is affirmed.

RUDKIN, C. J., FULLERTON, GOSE, CROW, MOUNT, and DUNBAR, JJ., concur.

[No. 7338. Decided March 13, 1909.]

ELLA A. SULLIVAN, *Respondent*, v. DANIEL SULLIVAN,
Appellant.¹

DIVORCE—GROUNDS—CRUELTY—WHAT CONSTITUTES—EVIDENCE—SUFFICIENCY. Personal violence is not necessary to constitute cruel treatment as a ground for divorce, and the evidence is sufficient to warrant a decree where it appears that the husband for seven years refused to speak to his wife or children except when absolutely necessary, made unjust charges of improper conduct, insulted and humiliated her guests, and made himself so disagreeable that the wife's life was rendered miserable and the legitimate ends and objects of matrimony had ceased to exist.

SAME—PERSONAL INDIGNITIES—EVIDENCE—SUFFICIENCY. The statutory ground of "personal indignities rendering life burdensome" authorizes a divorce, although the conduct does not fall within the accepted definition of cruel treatment.

SAME—DIVISION OF PROPERTY—SEPARATE AND COMMUNITY PROPERTY. In granting a divorce and dividing property which the parties have been accumulating for twenty-five years, its origin and the amount of rents and profits of separate estate during that time is immaterial, where a fair division is made.

SAME—ATTORNEY'S FEES—ALLOWANCES—APPEAL—HARMLESS ERROR. The allowance of an attorney's fee of \$2,500 in a divorce case where \$200,000 worth of property was divided, is not excessive and is without prejudice where the court would doubtless have increased plaintiff's allowance had the attorney's fee not been granted; and although under Bal. Code, § 5165, attorney's fees are to be left to private contract, where the parties have the means to employ them.

COSTS—ON APPEAL—RENTS PENDING APPEAL. Where pending appeal a decree of divorce dividing the property is superseded, the rents and profits pending the appeal will, on affirmance, be offset against allowances made to the respondent, in view of which interest and costs may be disallowed by the supreme court on prompt payment of the judgment by appellant.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered March 18, 1908, upon findings in favor of the plaintiff, in an action for a divorce, after a trial before the court without a jury. Affirmed.

Million, Houser & Shrauger, for appellant.

Smith & Brawley, for respondent.

¹Reported in 100 Pac. 321.

Mar. 1909]

Opinion Per RUDKIN, C. J.

RUDKIN, C. J.—This was an action for divorce, on the ground of cruel treatment and personal indignities rendering life burdensome. On the question of cruel treatment and personal indignities, the court made the following findings:

“That the said defendant is possessed of a sullen and at times ungovernable temper and has at different times and occasions ill-treated and abused plaintiff by calling her vile and abusive names, swearing and cursing at her and said children and applying to each of them vile epithets, and thereafter and for days and weeks at a time the defendant would go about his home in this sullen manner without ever speaking to the plaintiff or any member of his family, and that as time went on the defendant became worse in his manner and that for more than eight or nine years last past it has been only on rare occasions that he ever spoke to the said plaintiff, but that during all times he has not treated plaintiff as a husband should treat his wife.

“That during the fall of 1901 while the said plaintiff and defendant were living together as husband and wife, at their home near the town of Edison, the said defendant became enraged at plaintiff and said to her that she would soon be conducting a house of prostitution, and that there was no cause or provocation for such an accusation, and that since said time and by reason of the acts and misconduct of the defendant, the plaintiff and defendant have not lived or cohabited together as husband and wife.

“That on or about the — day of —, 1906, the said infant daughter of plaintiff and defendant was sick and it became necessary under the advice of a physician to take her to the state of California, and plaintiff did take said daughter to said state and on her returning to her home on the evening of June 27th of said year she found all the doors bolted, and upon knocking at the door the defendant opened the door, and when he discovered that it was the plaintiff he shut the door in her face.

“That on several occasions in the last seven years last past the defendant has ordered the plaintiff to leave his premises and never to return.

“That on or about the 2nd day of February, 1907, the said defendant, without any cause or provocation whatsoever,

commenced to swear at, curse and abuse the plaintiff by calling her vile and abusive names and applying to her the term of whelp, and did at said time direct plaintiff to quit and leave his premises.

"That during all the said married life the plaintiff has been a hard working woman, a true and loving wife and has attempted in every way to get along with the said defendant, but that the said defendant has from time to time ill-treated and abused her as aforesaid and has failed to practically recognize her as his wife, and has so humiliated and ill-treated her that he has rendered her life miserable and the court finds it is not possible for said parties to live together as husband and wife.

"The court further finds that by reason of the ill treatment of plaintiff by defendant that she has lost all love and affection for him and that defendant by reason of his disposition, cruel and inhuman treatment of plaintiff has no love or affection whatsoever for the said plaintiff."

The court further found that the community property of the parties was of the value of \$204,000, and that the defendant was possessed of separate property of the value of \$20,000. On these and other formal findings, a divorce was granted, the plaintiff was awarded the care and custody of a minor daughter, and money and property of the aggregate value of \$92,500, together with an attorney fee of \$2,500. The residue of the property, of the aggregate value of \$129,000, was awarded to the defendant. From this decree the defendant has appealed, and assigns as error the granting of the divorce, the disposition made of the property and property rights of the parties, and the allowance of the attorney fee.

The appellant has been an industrious, thrifty, hardworking man all his life, as is shown by his property accumulations. He was never of a very amiable disposition, and, as is usually the case, he grew more irritable and disagreeable as he grew older. The main difficulty between the husband and wife originated some ten years ago over the control and management of their children, consisting of four daughters.

Mar. 1909]

Opinion Per RUDKIN, C. J.

They disagreed entirely as to the manner in which the children should be brought up, how they should dress, what they should do, and when and where they should go, and with whom. Their relations became so strained some seven years ago that they ceased to cohabit as husband and wife, and since that time have been united in name only. During all these years the appellant has never spoken to his wife or children, unless his necessities compelled him to do so. He made himself so disagreeable about the house that his wife and daughters could have neither company nor callers without having them subjected to humiliation and insult. The respondent would not leave her home for years at a time, and we think the record amply bears her out in the assertion that the place was more like a jail than a home. The appellant himself testified that he had neither affection nor respect for his wife and children, and desired to have nothing further to do with her or them. He further testified that in his opinion his wife kept and conducted a disorderly house for ten years last past, and that by a disorderly house he meant a house bordering on prostitution. From this and other testimony in the record, it is very apparent that the legitimate ends and objects of matrimony have long since ceased to exist in this household, and the law should not compel a woman to return to such surroundings. The appellant contends that, in order to constitute cruel treatment, there must be actual personal violence or such conduct on the part of the husband as renders it dangerous or unsafe for the wife to continue to live and cohabit with him. This was no doubt the old rule, but the modern decisions have modified it to some extent. Thus, in *Carpenter v. Carpenter*, 30 Kan. 712, 744, 2 Pac. 122, the court said:

"It was formerly thought that to constitute extreme cruelty, such that authorized the granting of a divorce, physical violence was necessary; but the modern and better considered cases have repudiated this doctrine as taking too low and sensual a view of the marriage relation, and it is now very generally held that any unjustifiable conduct on the part

of either the husband or wife, which so grievously wounds the mental feelings of the other, or such as in any other manner endangers the life of the other, or so utterly destroys the peace of mind of the other as to seriously impair the bodily health or endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes 'extreme cruelty' under the statutes, although no physical or personal violence may be inflicted, or even threatened."

And numerous cases are cited in support of the rule there announced. Furthermore, the term "personal indignities rendering life burdensome," as used in our statute, includes conduct which does not fall within the accepted definitions of cruel treatment. 14 Cyc. 625. We are therefore of the opinion that the findings and testimony were ample to warrant the dissolution of the marriage contract.

The appellant excepted to the disposition of the property, as made by the trial court, and to its finding as to the extent and value of his separate estate. We think perhaps the court did ignore both the rents and profits arising from the husband's separate estate, and the increase in value of the property itself, in making its findings and conclusions; but aside from the land itself the separate and community property were so commingled that it would be impossible to separate or segregate the two at this time. Furthermore, after a husband and wife have toiled on together for upwards of a quarter of a century in accumulating property, what they may have had to start with is a matter of little concern. The origin of the property is only a circumstance in the case and the ultimate duty of the court is to make a fair and equitable division under all the circumstances. We think that end was substantially attained in the case at bar.

The appellant further contends that the attorney fee allowed is excessive. Bal. Code, § 5165 (P. C. § 1103), provides that,

"The measure and mode of compensation of attorneys and counselors shall be left to the agreement, expressed or im-

Mar. 1909]

Opinion Per RUDKIN, C. J.

plied, of the parties, but there shall be allowed to the prevailing party upon the judgment, certain sums by way of indemnity for his expenses in the action, which allowances are termed costs."

When the parties to a divorce action have ample means to employ their own counsel, or when they are furnished with ample means by the decree of the court, the compensation to be made to their attorneys should be left to the private contract of the parties, and the court should not assume to make contracts for them. In this particular case, however, if the court had not allowed the attorney fee it would doubtless have made the allowance indirectly by increasing the amount of property awarded to the respondent, so that the appellant has not been injured. In view of the nature of the action and the amount of property involved, it cannot be said that the allowance for attorney fees is unreasonable or excessive.

The appellant superseded the judgment of the lower court, and has had the use and occupation of the property awarded to the respondent, with the rents, issues, and profits thereof, pending the appeal. On the other hand, certain allowances have been made to the respondent by this court. *Sullivan v. Sullivan*, 49 Wash. 508, 95 Pac. 1095. The allowances made by this court will be permitted to offset any claim for interest or for rents and profits on the part of the respondent, and the supersedeas bond will be cancelled and held for naught, provided the appellant will surrender forthwith to the respondent the property awarded to her by the decree and pay the amount of the money awarded without interest. Subject to this modification, the judgment is affirmed without costs.

CROW, MOUNT, FULLERTON, and DUNBAR, JJ., concur.
CHADWICK and GOSE, JJ., took no part.

[No. 7645. Decided March 13, 1909.]

MERRELL PATE, *Respondent*, v. COLUMBIA & PUGET SOUND
RAILROAD COMPANY, *Appellant*.¹

CARRIERS—PASSENGERS—DERAILMENT OF CAR—PRESUMPTION OF NEGLIGENCE. The law presumes negligence from the breaking of an axle of a passenger coach whereby the car is derailed, and the burden of proof is upon the carrier to rebut the same.

SAME—QUESTION FOR JURY—EVIDENCE—SUFFICIENCY. Where a passenger coach is derailed by the breaking of an axle, evidence on the part of the defendant that its roadbed was in good condition, its cars and equipment properly inspected and its train carefully operated, does not show, as a matter of law, that it exercised due care, where there was other evidence tending to show that the train was operated at a high rate of speed and that the roadbed was rough and uneven.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$4,000 for personal injuries sustained by a passenger is grossly excessive, and should be reduced to \$1,000, where the physical injury was slight, consisting of a grazed shin and a bruise on the knee and on the hip, and pains in the side were claimed to have developed three weeks later, the cause of which was problematic, and there was nothing to warrant a finding of permanent injury.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 1, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for injuries sustained by a passenger through the derailment of a car. Reversed.

Farrell, Kane & Stratton and *Peter L. Pratt*, for appellant.

John E. Humphries and *George B. Cole*, for respondent.

RUDKIN, C. J.—This action was instituted to recover damages for personal injuries sustained by the plaintiff while a passenger on one of the defendant's trains. Shortly after the train in question left Maple Valley, on its return trip to the city of Seattle on the 7th day of July, 1907, one of the

¹Reported in 100 Pac. 324.

Mar. 1909]

Opinion Per RUDKIN, C. J.

axles under the tender broke, and the coach next to the tender, in which the plaintiff was riding, left the track. The front end of the coach went down over the embankment forming the roadbed, while the rear end remained attached to the next coach, which did not leave the track. After leaving the track, the coach stood upright at an angle of about 45 degrees. The seats in the coach were nearly all torn loose and the passengers were thrown or slid down to the front end of the car. According to the testimony of the plaintiff, the coach was the common one in ordinary use, about fifty feet in length, but other testimony tended to show that the coach was a combination passenger and baggage car, the portion set aside for passengers being about twenty-five feet in length. The nature and extent of the injuries suffered by the plaintiff will be considered in connection with the claim that excessive damages were allowed under the influence of passion and prejudice. The jury returned a verdict in favor of the plaintiff in the sum of \$4,000, and from a judgment on this verdict, the present appeal is prosecuted.

The only assignments of error we deem it necessary to consider or discuss are: first, that the court erred in denying a motion for judgment notwithstanding the verdict, because there was no evidence of negligence on the part of the appellant; and second, that the court erred in denying a motion for a new trial because excessive damages were allowed. The law presumes that accidents such as the one complained of are attributable to the negligence of the carrier, and the burden of proof is on the carrier to rebut this presumption. And while the testimony on the part of the appellant tended to show that its roadbed was in good condition, its cars and equipment properly inspected and its train carefully operated, there was other testimony tending to show that the train was operated at a high rate of speed, and that the roadbed was rough and uneven. It cannot be said, therefore, as a matter of law, that the appellant exercised that high degree of care which the law

exacts of those engaged in carrying passengers by the dangerous agency of steam. There was no error in denying the first motion interposed.

The actual physical injuries suffered by the respondent were slight, and for a considerable time after the accident he himself considered them so. They consisted of a grazed shin, a bruise on the knee, and a bruise on the hip. He was never in a hospital or confined to his bed, and no serious consequences have developed from these particular injuries. He claims, however, that about three weeks after the accident he was taken with a pain in his side, and this pain seizes him whenever he attempts to raise his arm above his shoulder, and that by reason thereof he is unable to follow his customary calling, that of a painter and decorator. Five surgeons in all testified at the trial, two for the respondent and three for the appellant, but their testimony was substantially the same. They all agreed that there were no objective symptoms, and that they were compelled to rely entirely upon the statements of the respondent as to the existence, nature, and extent of the pains and injuries from which he was suffering. If the pains exist as claimed, their cause is problematic. Dr. Carroll, for the respondent, who performed an operation on him some three years before, testified that the pains might result from the previous operation, from a cold, or from other causes, and would go no farther than to say that the pains might also result from a fall. No witness was questioned or testified as to the probable duration of the pains or disability, if they in fact existed, and there was no testimony that would warrant the jury in finding that the injuries were permanent. Under these circumstances, we have no hesitation in saying that the verdict returned by the jury is grossly excessive. If the injuries suffered by the respondent are more serious and more lasting than the record before us would indicate, the respondent is under no obligation to submit to the reduction which this court is compelled to make, but may call for a new trial. It seems to us that

Mar. 1909]

Syllabus.

any verdict in excess of \$1,000 would be excessive in this case, and a new trial is ordered unless the amount of the recovery is limited to that sum.

The judgment of the court below is therefore reversed; and if the respondent elects to accept \$1,000, and costs in the court below, within ten days after the remittitur is filed there, a new judgment will be entered for that amount; otherwise, a new trial is granted. The appellant will recover its costs in this court.

CROW, DUNBAR, MOUNT, FULLERTON, GOSE, and CHADWICK, JJ., concur.

[No. 7805. Decided March 13, 1909.]

C. F. MENDENHALL, *Administrator of the Estate of*
Frank C. Mendenhall, Deceased, Respondent,
v. WILLIAM T. DAVIS *et al.*, *Appellants.*¹

PLEADINGS—ANSWER—DENIALS—SUFFICIENCY—JUDGMENT ON PLEADINGS. In an action on a note and chattel mortgage, in which the answer admits the execution of the note and mortgage and attempts to set out an affirmative defense which showed that the indebtedness was not paid, a denial that the defendants "owe the sum of \$900, or any other sum or amount whatsoever on account of the note and mortgage above described, or at all," is not sufficient as a denial to put plaintiff upon proof or prevent a judgment for plaintiff on the pleadings.

CONTRACTS—FOR PERSONAL SERVICE—PERFORMANCE—DISCHARGE. A contract for personal services is discharged by the death of the party rendering the same.

SAME—DAMAGES ON DEATH OF EMPLOYEE—SET-OFF AND COUNTERCLAIM. An action for damages will not lie for breach of a contract for personal services, caused by the death of the party employed, but the employer may, when sued by the estate for the sum agreed to be paid for the service, set-off or plead in bar the damages he has sustained, if any, by reason of deceased's failure to perform.

EXECUTORS AND ADMINISTRATORS—ACTIONS—SET-OFF AND COUNTERCLAIM. Where as part consideration for a note, the payee agreed to work for the maker for six months as a dentist, giving defendant

¹Reported in 100 Pac. 336.

one-half of his earnings, and died before completing the contract, in an action by his executors on the note, the maker may offset his damage for failure of the decedent to perform the contract, if the same was more favorable to defendant than any contract he could have made with any other person equally skilled; and the measure of such damage is the difference between the contract made and a contract for service with one equally skilled.

SAME—SET-OFF AND COUNTERCLAIM—PRESENTATION OF CLAIM. In an action brought by an executor or administrator, a demand against the estate may be offset to the extent of plaintiff's recovery, without previous presentation of a claim therefor, as required by Bal. Code, § 6226, under Pierce's Code, § 1093, providing for a set-off in such cases "in the same manner as if the action had been brought by and in the name of the deceased."

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered October 14, 1908, in favor of the plaintiff, upon the pleadings, after sustaining a demurrer to the answer, in an action upon contract. Reversed.

Hathaway & Alston, for appellants.

O. T. Webb, for respondent.

CHADWICK, J.—On the 29th day of June, 1907, Frank C. Mendenhall was engaged in the practice of dentistry in the city of Everett, and on that day sold his business to defendant William T. Davis, for the sum of \$1,700, of which the sum of \$800 was paid in cash, and \$900 was made payable on or before one year after date, with interest at the rate of eight per cent per annum. To secure the payment of the \$900, defendant William T. Davis executed a chattel mortgage covering the office furniture and fixtures, and all the tools, implements, and materials contained in his office. As a part of the transaction, the parties entered into the following contract, in writing:

"This contract, made and entered into this June 29th, 1907, by and between Frank Mendenhall of the first part and William T. Davis of the second part, witnesseth:

"That, Whereas, a contract of purchase and sale has been entered into by and between the parties hereto as of this

Mar. 1909]

Opinion Per CHADWICK, J.

date, as part consideration for said bill of sale, said Mendenhall hereby agrees to and with said Davis to render to said Davis six months' services as dentist in dental surgery in his office, said Mendenhall to retain fifty per cent of all money collected on new work performed by him; and he hereby further agrees not to enter into the business of dentistry in the city of Everett within five years from date hereof."

Mendenhall died October 29, 1907, and this action is prosecuted by the administrator of his estate. Defendants made the following plea in bar of plaintiff's complaint:

"(2) That at the time of executing the bill of sale aforesaid and note and mortgage referred to in the plaintiff's complaint herein and as a part of the same transaction, the said Frank Mendenhall and defendants entered into a contract whereby and wherein it was agreed that the said Frank Mendenhall was to render to the said defendants six months' services as dentist in dental surgery in his office, located at the premises described in said mortgage, and that said defendants were to receive fifty per cent (50%) of all moneys collected on new work performed by said Frank Mendenhall; that such services were to be as a part of the consideration for the money paid and agreed to be paid by the said defendants to the said Frank Mendenhall, a copy of which contract is hereto annexed marked Exhibit No. "2," and made a part of this complaint; that on account of serious illness and death he became incapable of performing further services.

"(3) That in accordance with said contract the said Frank Mendenhall did perform services for the defendants as dentist in dental surgery for the period of four (4) weeks and no more; that on account of serious illness and death he became incapable of performing further services, and that he earned, during said four weeks in new work, the sum of four hundred and eighty-eight dollars and 50-100 (\$488.50), of which money the defendants were entitled to the sum of two hundred and forty-four dollars and 25-100 (\$244.25) under and by their agreement with the said Frank Mendenhall; that of said two hundred and forty-four dollars and 25-100 (\$244.25), the said Frank Mendenhall paid

to the defendants the sum of of seventy dollars and 25-100 (\$70.25) and no more; that the services which the said Frank Mendenhall agreed to render to defendants as a part of the consideration for the note and money paid to the said Frank Mendenhall by the defendants as aforesaid, was reasonably worth to the defendants the sum of thirteen hundred and sixty-five dollars and 40-100 (\$1,365.40).

"(4) That the goods and chattels described in the bill of sale above referred to and the mortgage referred to in the plaintiff's complaint here, were worth not to exceed four hundred and thirty-five dollars (\$435), and that the consideration for the remainder of the seventeen hundred dollars (\$1700) which the defendants paid and agreed to pay the said Frank Mendenhall, was the services which the said Frank Mendenhall agreed to render to the defendants as aforesaid."

A demurrer was sustained to the plea in bar. Plaintiff then moved for judgment on the pleadings, which being allowed, defendants have appealed.

Inasmuch as respondent meets the argument of appellants with the proposition that there is no proper denial of the indebtedness in appellants' answer, and for that reason a judgment on the pleadings was properly sustained, we shall dispose of that question before discussing the more important differences raised by the record. After admitting the execution of the note and mortgage, appellants said:

"The defendants deny that they owe the plaintiff the sum of \$900, or any other sum or amount whatsoever, on account of the note and mortgage above described, or at all."

If the demurrer was properly sustained to the affirmative defense, the motion for judgment on the pleadings was properly granted, under the rule announced in the case of *Columbia Nat. Bank v. Western Iron & Steel Co.*, 14 Wash. 162, 44 Pac. 145. But that case does not hold that an admission, either direct or technical, of a debt due precludes a party from pleading an offset or counterclaim. The case of *Edson v. Dillaye*, 8 How. Pr. 273, was adopted as the

Mar. 1909]

Opinion Per CHADWICK, J.

authority upon which to rest the decision of the court. The rule there stated is as follows:

“Having admitted the making of the note *and not having set up any fact showing why they ought not to pay it*, their liability to pay is a legal conclusion, from which the defendants cannot escape.”

Therefore, admitting that the amount of the note was due from appellants to respondent, our only inquiry should be as to the correctness of the order sustaining the demurrer to the affirmative defense. The demurrer admitted the facts set out in that part of the affirmative answer hereinbefore quoted. It will be seen, that a part of the consideration for the note was the agreement of Mendenhall that he would remain in the office for six months, during which time he would render services as a dental surgeon; that his earnings were to be equally divided between the parties to the agreement; and that, after one month's services, he was stricken with an illness of which he died. The position of the respondent is that the contract, in so far as it bound his decedent to render personal services, was discharged by his death. The rule relied on by respondent is stated in Anson, Law of Contracts (8th Am. ed.), p. 395, as follows:

“A contract which has for its object the rendering of personal services is discharged by the death or incapacitating illness of the promisor.”

The following authorities are cited to sustain this doctrine: *Robinson v. Davison*, L. R. 6 Exch. 269; *Spalding v. Rosa*, 71 N. Y. 40, 27 Am. Rep. 7; *Janin v. Browne*, 59 Cal. 37; *Singleton v. Carroll*, 6 J. J. Marsh. 527, 22 Am. Dec. 95; *Blakely v. Sousa*, 197 Pa. St. 305, 47 Atl. 286, 80 Am. St. 821; 9 Cyc. 631.

It occurs to us that a deeper principle is involved in the case at bar. Unquestionably respondent's testator was relieved of personal performance of the contract by his death; but should that event preclude appellants from pleading, as an off-set or counterclaim, the loss of the service, when it

had been promised as part consideration for a debt contracted by the appellants? The cases cited affirm this principle. If "A" hire "B" to perform a service, personal in its nature, at a stipulated wage, and no concern is taken in the contract of death or illness, the death or illness of "B" will so release him of his obligation that no damage will follow the untimely termination of the contract. For, as was said in *Robinson v. Davison*, *supra*, adopting the language of the court in *Hall v. Wright*, 1 E. B. & E. 793:

"Now it must be conceded on all hands that there are contracts to which the law implies exceptions and conditions which are not expressed. All contracts for personal services which can be performed only during the life time of the party contracting, are subject to the implied condition that he shall be alive to perform them; and should he die, his executor is not liable to an action for the breach of contract occasioned by his death. So a contract by an author to write a book within a reasonable time, or by a painter to paint a picture within a reasonable time, would, in my judgment, be deemed subject to the condition that, if the author became insane, or the painter paralytic, and so incapable of performing the contract by the act of God, he would not be liable personally in damages any more than his executors would be if he had been prevented by death."

But it does not follow that the rule would be the same if "A" had paid to "B" \$800 in cash, agreed to pay \$900 in the future, and had executed and delivered his promissory note for that amount, in consideration of the transfer of property of the value of \$435, the good will of the business, and "B's" contract that he would work for a certain time for a certain sum. In the case just supposed, "B" has received his part of the consideration, and would be held to full performance, if alive. His estate succeeding to his interest in all that "A" had rendered unto him, we think it should be held to answer; for there has been a partial failure of consideration.

In the case of *Robinson v. Davison*, the leading case upon respondent's theory, one party had employed the other to

Mar. 1909]

Opinion Per CHADWICK, J.

play the piano at an entertainment to be given at a future time. Sickness intervened, and the contract was not performed. The court held that an action for damages would not lie; that where one was employed because of peculiar skill or attainment, there was, in the absence of an express agreement, an implied condition that he would be physically able or alive at the time set for performance. The rule is otherwise where the price has been advanced in consideration of the promise to render the service and a suit brought for its recovery. In such case the party, if alive, would be bound to return the unearned consideration; then why not his estate, if he be dead? An estate is liable on all contracts of the decedent which were broken in his lifetime, and, except those contracts whose performance require personal skill and taste, on all those that are broken after his death.

“An executor or administrator is liable, in general, to the extent of the assets which come to his hands to be administered, upon all the contracts of the deceased remaining undischarged at his death. Accordingly, the executor or administrator is liable, so far as he has assets, for debts of every description due from the deceased, either debts of record, as judgments, statutes, or recognizances; or debts due on special contract, as for rent or on bonds, covenants or the like under seal; or debts on simple contracts, as notes unsealed, and promises not in writing either expressed or implied.” Chitty, Contracts (11th Am. ed.), p. 1406.

See, also, 3 Williams, Executors (7th Am. ed.), p. *1598; 2 Woerner, American Law of Administration, § 328.

In the case before us the consideration for the \$800 in money and the \$900 note is made up of three parts; \$435 worth of office furnishings, an agreement not to engage in business in Everett within five years, and a contract for six months' service. The first two of these are concluded, the one by the transfer and the other by the death of the promisor. But appellant is entitled to show as a defense, if it be a fact, that the contract he had with Mendenhall was

a more favorable contract than he could have made with another equally skilled and competent. If so, the difference would be the measure of damages, and he can counterclaim it against the \$900 obligation which he has admitted in his pleadings. If he could have made as favorable a contract with another there would be no damage.

During the four weeks Mendenhall worked in the office he earned \$488.50. Of this appellant was entitled to \$244.25, of which \$70 has been paid. The court below held that the balance due could not be pleaded in defense of respondent's cause of action, it not appearing that the claim had ever been presented to the administrator for allowance or rejection. In this the court erred. Under Pierce's Code, § 1093, in an action brought by an executor or administrator, a demand against the estate may be offset to the extent of plaintiff's recovery without presentation, under Pierce's Code, § 2531 (Bal. Code, § 6226). While there is a divided authority, and in the absence of a statute the holding of the lower court is sustained by the greater number, it was held in *Fishburne v. Merchants' Bank of Port Townsend*, 42 Wash. 473, 85 Pac. 38, in accordance with the better reason, that the section of the statute above referred to expressly authorizes a set-off or counterclaim in an action brought by an executor or administrator.

The judgment of the lower court is reversed for further proceedings in accordance with this opinion.

RUDKIN, C. J., GOSE, DUNBAR, MOUNT, and FULLERTON, JJ., concur.

Mar. 1909]

Syllabus.

[No. 7814. Decided March 16, 1909.]

JOHN P. NELSON, *Appellant*, v. WESTERN STEAM
NAVIGATION COMPANY, *Respondent*, PACIFIC
COAST STEAMSHIP COMPANY, *Appellant*.¹

MASTER AND SERVANT—RELATION—SHIPPING—PROOF OF OWNERSHIP OF VESSEL—EVIDENCE—SUFFICIENCY. In an action for personal injuries sustained by a sailor, there is not sufficient evidence that defendant, a corporation whose officers were nonresidents, was the owner of the steamship or had any control over it, and a nonsuit is properly granted, where the evidence merely showed that defendant's name was painted across the bow, its stationery, tickets, and shipping receipts used, the ship was running under a bond theretofore given in defendant's name, and one of its stockholders had signed the name of agents to a contract agreeing to run the ship in defendant's name, such contract clearly showing that defendant had no control of the ship or share in its profits, and there was no evidence tending to show actual or constructive notice by the defendant of any of the above facts, and it appeared that the defendant had previously sold its line of steamers and was not operating any.

CORPORATIONS — REPRESENTATION — STOCKHOLDERS. The fact that one of the stockholders of a corporation entered into a contract with reference to the use of the corporate name by a third person, is not constructive notice to the corporation of the terms of the contract.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$2,000 for personal injuries sustained by a sailor and longshoreman, thirty-two years old, earning \$40 per month as a sailor, and capable of earning 40 or 50 cents per hour as longshoreman, is not excessive, where it appears that his toes were crushed and had to be amputated, that he suffered great pain, was in the hospital 2½ months and lost about six months' time, and cannot follow the occupation of sailor or longshoreman.

APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS—RULINGS ON EVIDENCE. Under Bal. Code, § 5054, an exception is not necessary where an objection is interposed and a ruling made on the offer of evidence.

SAME—EXCEPTIONS TO INSTRUCTIONS—NECESSITY. An exception to instructions to the jury on a certain subject is not necessary to predicate error on the exclusion of evidence thereon, after objection interposed and ruling made at the trial.

¹Reported in 100 Pac. 325.

DAMAGES—PERSONAL INJURIES—MEDICAL ATTENDANCE—WHEN RECOVERABLE—FREE HOSPITAL. In an action for personal injuries, the plaintiff cannot recover the reasonable value of medical attendance and hospital charges furnished to him as a sailor free of charge at a marine hospital.

MASTER AND SERVANT—RELATION—EVIDENCE—OWNERSHIP OF VESSEL. In an action by a sailor to recover damages for personal injuries from the owner of the ship, evidence is admissible as to repairs and damages paid by defendant, resulting from a collision with another vessel, as tending to show the defendant's ownership and operation.

CONTRACTS—CONSTRUCTION BY PARTIES—AMBIGUITY—EVIDENCE. Where a contract is ambiguous, evidence is admissible to show the construction placed on it by the parties.

MASTER AND SERVANT—RELATION—LIABILITY OF OWNERS OF VESSEL—CHARTER—EFFECT—CONSTRUCTION. There is no such complete demise or charter of a steamship as will make the charterers owners *pro hac vice* and release the general owners from liability for injuries to a sailor caused by reason of the negligence of the mate, where the agreement for the operation of the ship by the charterers provided for a division of the earnings, and as construed by the parties, the general owners had "more or less control of the ship," employed the captain and chief engineer (the captain employing the mate) and paid for repairs, expenses, and damages arising in the operation; since the fact that the charterers could not discharge the captain without the consent of the general owners, establishes the relation of master and servant between the owners and captain.

MASTER AND SERVANT—INJURIES TO SEAMAN—NEGLIGENCE OF MASTER—VICE PRINCIPALS—EVIDENCE—SUFFICIENCY. There is sufficient evidence of negligence to render the owner of a steamship liable to a sailor who was injured while assisting to load a boiler plate, where it appears that the mate, who was drunk, ordered him to pry on the plate with a crowbar, and then without warning, and while his back was turned, started the steam winch with a jerk, causing the fall rope to break and the plate to fall and injure the plaintiff; as the mate is a vice principal and not a fellow servant of the seaman.

MASTER AND SERVANT—RELATION—EVIDENCE. A contract purporting to be signed by the defendant, under which the ship was operated by defendant and it received its share of the profits, is admissible in evidence to show ownership, without proof of its execution.

APPEAL—REVIEW—HARMLESS ERROR. The admission in evidence of a contract, without proof of its execution, to show the relation of master and servant is harmless where the relation was established by other evidence.

Mar. 1909]

Opinion Per Gose, J.

Cross-appeals from a judgment of the superior court for King county, Tallman, J., entered July 9, 1908, upon the verdict of a jury rendered in favor of the plaintiff against one of the defendants, after the granting of a nonsuit in favor of the other defendant, in an action to recover for personal injuries. Affirmed on plaintiff's appeal, and reversed and the amount of the recovery reduced on defendant's appeal.

Wilson R. Gay and *Geo. H. Rummens*, for appellant Nelson.

Farrell, Kane & Stratton and *Peter L. Pratt*, for appellant Pacific Coast Steamship Company.

Hughes, McMicken, Dovell & Ramsey, for respondent Western Steam Navigation Company.

GOSE, J.—On October 9, 1906, the appellant Nelson was injured while working as a sailor in loading a steel boiler plate on the steamship Ramona, at the pier in the city of Seattle. The complaint alleges, that the appellant Nelson, on October 9, 1906, was employed as a seaman on the steamship Ramona, by the respondent and the appellant corporations; that on said day he was working under the direction of the mate of the ship; that the mate was undertaking to load a large piece of boiler plate, by means of a spar derrick operated by a steam winch and a defective fall rope; that the fall rope was attached to the plate by means of grab hooks; that, in the process of loading, the steel plate caught under a stringer or riser at the outer edge of the pier; that the mate ordered him to assist in prying the plate free with a crowbar; that while he was engaged in doing this, the mate suddenly and without warning or notice started the winch, by reason of which the fall rope broke, the plate fell against the crowbar and knocked it from his hands, causing it to strike the three inside toes, so injuring them that it became necessary to amputate them; that they

were amputated, and that his damage was \$12,000. The respondent company put all these averments in issue by proper denials.

The appellant corporation, after making suitable denials, pleaded affirmatively, (1) that the injury, if any, was due to the negligence of the appellant Nelson; (2) that it was due to the negligence of a fellow servant; (3) that it was due to risks assumed by Nelson. At the conclusion of the evidence, its sufficiency was challenged both by the respondent and by the appellant corporation. The challenge was sustained as to the respondent, and denied as to the appellant corporation. Whereupon the jury returned a verdict of \$2,000 against the appellant corporation, and a judgment was thereupon entered against it for that amount, and dismissing the case as to the respondent. The appellant Nelson has appealed from that part of the judgment in favor of the respondent, and the appellant corporation has appealed both from the judgment against it and from that part of the judgment in favor of the respondent.

We will first consider whether any error was committed in entering a judgment in favor of the respondent. The evidence upon which a recovery was sought against it was, that the name of the respondent appeared in large letters across the bow of the steamer, under the name "Ramona;" that the stationery, tickets, shipping receipts, and bills of lading were those of the respondent; that the ship was running under a bond theretofore given to the government in the name of the respondent; that one of its stockholders signed the name of Cook & Company to a contract which they entered into with the appellant corporation, whereby it was agreed that the Ramona should be run in the name of the respondent. It is also claimed that the ship was flying the respondent's flag, but the evidence shows that it was flying the flag "V. L.," meaning "Victoria Line," and that it was the flag of the appellant corporation. It does not appear that the respondent authorized the use of its name

Mar. 1909]

Opinion Per Gose, J.

on the boat, or that it had any knowledge of the contract between Cook & Company and the appellant corporation. Nor does it appear that the respondent had any notice that its stationery was being used. Exhibit A, the contract between Cook & Company and the appellant corporation, is the only written evidence in the record as to the names of the operators of the ship or the division of the profits resulting from its operation. It shows clearly that the respondent had no share in its profits, and that it had no part in its management or control. The evidence makes it clear that, in 1903, the respondent sold its line of steamers and good will to the appellant corporation; that since that time it has not operated any ship on the Sound; that its officers were nonresidents of the state at the time of the accident.

The record is barren of evidence tending to show that the respondent had either actual or constructive notice that the ship was to be operated in its name, or that it was so operated, aside from the fact that one of its stockholders signed the name of Cook & Company to the contract to which reference has been made. This is not constructive notice. The appellant corporation owned the ship, and prior to the execution of the contract with Cook & Company, it had been running it. There is no evidence as to who placed the name of the respondent on the boat, other than the presumption which may be drawn from the admitted ownership. It does not appear that any conduct upon the part of the respondent induced the belief in any one that it was in any way connected with the operation of the steamer. Every act tending to connect the respondent with its operation was the act either of Cook & Company or the appellant corporation, or both, and did not proceed from any authority derived from the respondent, either express or implied.

To hold the respondent liable in damages under the evidence in the record would be to extend the doctrine of estoppel beyond both principle and reason. *Ames v. Farmers & Mechanics Bank*, 48 Wash. 328, 93 Pac. 530, is cited in

support of the respondent's liability. It is clearly distinguishable. In that case a depositor in the Bank of Cheney sued the Spokane bank for the recovery of the amount of his deposit, and alleged that the Cheney bank had advertised itself as a branch of the Spokane bank; that the latter had notice of such advertisement; that the two banks had united as principals in a bond which recited that the Cheney bank was controlled by the Spokane bank; that the Spokane bank through its vice president and cashier, in the application for such bond, made a like statement; that the president of the Spokane bank had knowledge of these facts. We conclude, therefore, that the court did not err in sustaining the respondent's challenge to the evidence and entering a judgment of dismissal in its favor.

The appellant corporation assigns eight errors as to the judgment entered against it, which it groups in its brief under two heads, viz: (1) Granting a cause of action, what is the proper measure of damages? (2) Was there a cause of action established against it? We will consider these points in the order stated.

The evidence shows that the appellant Nelson was thirty-two years of age, a sailor and longshoreman by occupation; that at the time of the accident he was earning \$40 per month, and board and lodging; that as a longshoreman he could earn forty or fifty cents an hour; that the great toe and the two adjoining ones were badly mashed; that he was taken to the hospital shortly after the injury occurred, and two of his toes were amputated that evening; that such amputation was necessary; that three weeks later the foot became so discolored and swollen that the great toe was amputated; that he suffered great pain; that he was in the hospital from October 9 until December 21 following; that he could not sooner leave the hospital; and that he was not able to work until the following April. At the time of the trial, May, 1908, he testified that his foot would get sore and tender and pain him in walking. The evidence further

Mar. 1909]

Opinion Per GOSE, J.

shows that he cannot follow the occupation either of a sailor or of a longshoreman. The jury saw him and heard him testify. It is clear that the verdict was not excessive except as to the items hereafter stated.

A witness for the appellant Nelson, Dr. Underwood, in his direct examination testified that \$75 was the reasonable value of the services of the surgeon for performing the operation; that the value of the ward at the hospital was \$8.50 a week, and that the value of the operating room was \$10. On his cross-examination the following transpired:

"Question: Did you attend him immediately after he received his injury? Answer: Yes, sir. Q. He was sent to the marine hospital at Port Angeles, was he? A. Here in this city. Q. And you are one of the physicians there? A. Yes, sir. Q. Mr. Nelson was a sailor, wasn't he? A. He was. Q. And they don't have to pay?"

Here an objection was interposed and sustained by the court; whereupon the following occurred:

"Q. You are employed by the government and paid by the government, aren't you, doctor? A. Yes, sir. Q. And the marine hospital, do they take any one except sailors and seafaring men? A. They don't; no, sir."

The ruling of the court sustaining the objection to the question, "And they don't have to pay," is urged as error. The court instructed the jury that, "You should take into consideration the reasonable value of the services of medical attendance, hospital bills, in nursing and caring for his injury not to exceed \$250." No exception was taken to the ruling of the court, and the appellant Nelson contends, therefore, that no error can be predicated on that ruling. When an objection is interposed and a ruling made thereon, an exception is not required. Bal. Code, § 5054 (P. C. § 671). Nor was the appellant corporation required to except to the instruction to preserve the question. The attention of the court had been directed to the fact that it sought to show that the appellant had not incurred any expense for surgical aid or hospital bills. The court refused to permit

it to make such showing. It therefore has a right to urge this error. *La Rault v. Palmer*, 51 Wash. 664, 99 Pac. 1036. The fundamental conception of damages is that it means compensation. This court has held that, where such expenses have been incurred, they can be recovered even before payment. *Cole v. Seattle, Renton & Southern R. Co.*, 42 Wash. 462, 85 Pac. 3. It has not held that there can be a recovery for a service of value where no charge has been made therefor. Such items have no support either in right or in law, and the ruling of the court was erroneous. *Lawson v. Seattle & Renton R. Co.*, 34 Wash. 500, 76 Pac. 71. The testimony admitted shows that the value of such items does not exceed \$175. The testimony as to the repairs to the ship and the payment of damages by the appellant corporation, resulting from a collision between the *Ramona* and another ship, tended to show that the appellant corporation owned and was exercising control over the ship, and its admission was not error.

(2) Was there a cause of action established against the appellant corporation? The following memorandum of contract was admitted in evidence and is the Exhibit A to which reference has been made:

"Memorandum of agreement between C. W. Cook & Co., and Pacific Coast Steamship Co., in reference to the operation of the Str. *Ramona* on the Seattle-Tacoma-Vancouver route.

"The Str. *Ramona* will be operated by Cook & Co., under the name of the Western Steam Navigation Co., from the present date up to the time Cook & Co. have a vessel to place upon the run, the Pacific Coast Steamship Company allowing Cook & Co. five (5%) per cent of the gross earnings as compensation for the operation and management of the said Steamer *Ramona* up to the time Cook & Co. have a steamer to place upon the run.

"On and after the date Messrs. Cook & Co. have a steamer ready to place upon the run the operations shall be as follows:

"It shall be mutually agreed as to which steamer shall be

Mar. 1909]

Opinion Per GOSK, J.

operated, as far as possible the Ramona to be operated in the summer time, the steamer owned by Cook & Co. to be operated in the winter time, or say between November 1st and May 1st, the earnings of the steamer that is upon the run to be divided on the basis of seventy-five (75%) per cent of the net earnings to the owner of the steamer and twenty-five (25%) per cent to the other party. For instance, if the Str. Ramona is operating thereon, the Pacific Coast Steamship Co. are to receive seventy-five (75%) of the net earnings, Cook & Co. twenty-five (25%) per cent of the net earnings. If the steamer which Cook & Co. will have to place upon the run is operating thereon, the net earnings to be divided seventy-five (75%) per cent to Cook & Co. twenty-five (25%) per cent to the Pacific Coast Steamship Co.

"This arrangement to continue in effect until January 1, 1909. Should cancellation be desired by either party, six months' written notice should be given. This, however, will not prevent either party from withdrawing the boat owned by such party from the run if found desirable.

"This agreement dated Seattle, Washington, this fourth day of August, 1905.

C. W. Cook & Company,

"By C. W. Cook.

"Pacific Coast Steamship Company,

"By W. E. Pearce."

The contract being ambiguous in certain particulars, evidence was properly admitted showing the construction placed upon it by the parties. The testimony of the manager for Cook & Company, shows that the captain and chief engineer were employed by the appellant corporation; that the captain employed the mate; that the mate employed the sailors; that the appellant corporation "had more or less control of the ship;" that Cook & Company "would have to consult them before we could do anything;" that Cook & Company could not discharge the captain and put their own man in authority without the consent of the appellant corporation; that if the expenses exceeded the receipts, the appellant corporation paid the deficit; that the appellant corporation paid for putting sheathing on the ship; that when the Ra-

mona collided with the Moana, the appellant corporation paid the damages; that the respondent sold its line of steamers, good will, and assets to the appellant corporation in 1903. The only deduction which can be drawn from this undisputed evidence is, that the appellant corporation through the captain retained the control of the ship; that the captain was its servant; that he employed the mate, and the latter hired and discharged the sailors. The negligence of the mate was the negligence of the master.

Under this head the appellant corporation argues that there was a complete demise or charter of the ship to Cook & Company, and that as charterers they became the owners *pro hac vice*, and that no liability rests upon it. The authorities which it relies upon to sustain this contention proceed from the premise that there must be a full and complete divestiture of all management and control upon the part of the owner in order that he may escape liability. In *Thorp v. Hammond*, 12 Wall. 408, 20 L. Ed. 419, it is stated that the evidence shows that the ship was "commanded, sold, and exclusively managed" by the charterers. The court was equally divided as to the liability of the general owners. *Posey v. Scoville*, 10 Fed. 140, states that the general owner of the steamer appointed the officers with the evident consent of the charterers. In *Webster v. Disharoon*, 64 Fed. 143, 144, it is said:

"It is clear that the master of the Margie J. Franklin must be regarded as her owner *pro hac vice*. He sailed her on shares, and had sole control of her use and navigation."

In *The Shadwan*, 49 Fed. 379, 381, it is said:

"The charter, moreover, provided expressly 'that the captain, although appointed by the owners, shall be under the orders and directions of the charterer, as regards employment, *agency*, or other arrangements.'"

The foregoing are the strongest cases tending to support the contention of the appellant corporation to which our attention has been directed. The facts in this case are clearly

Mar. 1909]

Opinion Per Gose, J.

distinguishable from those upon which such opinions were based. We think the true rule, and the one which should control in this case, is stated in *Scarff v. Metcalf*, 107 N. Y. 211, 13 N. E. 796, 1 Am. St. 807, wherein, at page 810, the court said:

"There is very much of authority for the doctrine that where there is a charter of the vessel which strips the owner of all authority, possession, and control, the charterer becomes owner *pro hac vice*, and the general owner ceases to be liable for the contracts or torts of the master, except for the wages of seamen. There seem to be limitations upon that doctrine, and doubts about it, although the main drift of authority is in that direction: *Hallet v. Columbian Ins. Co.*, 8 Johns. 272; *Thorp v. Hammond*, 12 Wall. 408; *Thomas v. Osborn*, 19 How. 22; *Reynolds v. Toppan*, 15 Mass. 370, 8 Am. Dec. 110. But I have arrived at the conclusion that this doctrine, even if broadly maintained, applies only to cases in which there has been an actual demise of the vessel such as to take from the owner all possession, authority, and control, and not to cases where there has been merely a contract about the vessel for the division of earnings and expenses. There are cases which may justly be cited as not in accord with that conclusion: *Taggard v. Loring*, 16 Mass. 336, 8 Am. Dec. 140; *Cutler v. Winsor*, 6 Pick. 335, 17 Am. Dec. 385; but the current of authority in this state runs in its favor, and I am strongly convinced that it is sound in principle and just in its application. In *Hallet v. Columbian Ins. Co.*, *supra*, there was an actual charter of the vessel, the owners receiving a stipulated price for its use. In *Thorp v. Hammond*, *supra*, the arrangement, although a letting on shares, is described by the court as, in effect, a chartering of the vessel, and a surrender by the owner of all authority and control. The case was one of collision, and largely affected by the terms and language of the act of Congress of 1851. In *Kenzel v. Kirk*, 37 Barb. 113, where the vessel was let to the master on shares, he to provide supplies, it was ruled that there was not a 'positive chartering,' and the owners were liable for supplies to a vendor ignorant of the arrangement. In *Macy v. Wheeler*, 30 N. Y. 241, it was said that the liability for supplies depends, not on legal ownership, but possession and control.

In *Vose v. Cockroft*, 45 Barb. 58, 60, there was a written agreement that the master should sail the vessel on shares in the customary way, he to man and provision her, pay one-half of port charges and expenses and of extra labor, and have 'as wages' one-half of the gross freight. This was held not to be a chartering of the vessel, and great force was given to the stipulation describing the master's share as 'wages.' In *McCready v. Thorne*, 49 Id. 438, there was a letting on shares, the master to victual, man, and sail the ship at his own expense, pay port charges out of earnings, and divide the balance equally with the owners. It was ruled that the master was not owner *pro hac vice*, and that the general owners were liable for unpaid port charges. A comparatively recent case in the English courts discusses the liability of the owner for the negligence of the master, where the relations between them were much like those in the case at bar: *Steel v. Lester & Lilee*, L. R. 3 C. P. D. 121. Lester was owner, and Lilee was captain. It was agreed between them that Lilee should sail the ship wherever he chose, be at liberty to take or refuse any cargo, engage and pay the men, and furnish all requisite supplies, and give Lester one-third of the net profits. While the vessel was unloading at its port of destination, under a charter-party made by the master, the wharf was damaged by the sloop through the negligence of Lilee, and Lester was sued for the damages. The court decided that the arrangement did not amount to a demise of the vessel, and was not such an absolute parting with it as would sever the control. These authorities indicate a distinction, which I am content to recognize, between an actual demise of the vessel, which transfers its possession, and all authority and control over it, and a mere arrangement for the sailing of the ship, which does not amount to a demise, and therefore leaves some possession, authority, and control in the owner, although narrowed and restricted by the terms of the agreement. Unless there is an actual demise of the vessel which destroys the relation of master and owner, and substitutes that of bailor and bailee, the relation must continue, and the master remain servant and agent of the owner."

See, also, *Indiana Iron Co. v. Cray*, 19 Ind. App. 565, 48 N. E. 808. Cook & Company could not discharge the captain without the consent of the appellant company, which

Mar. 1909]

Opinion Per Gose, J.

means that they could not discharge him at all. This fact establishes the relation of master and servant between the appellant corporation and the captain. *Butler v. Townsend*, 126 N. Y. 105, 26 N. E. 1017. In *Pioneer Fireproof Const. Co. v. Hansen*, 176 Ill. 100, 108, 52 N. E. 17, the rule as to what constitutes control of a servant is aptly stated in the following language:

"Control of servants does not exist, unless the hirer has the right to discharge them and employ others in their places."

Upon the question of negligence there was testimony showing, that at the time of the accident the mate was running the steam winch; that he knew the boiler plate was caught under the riser at the outer edge of the pier; that he directed Nelson to pry on it with a crowbar; that the mate saw, or by the exercise of reasonable care could have seen, Nelson; that while Nelson was prying on the plate with the crowbar, with his back to the ship, one end of the plate being then elevated above the pier, the mate, who was then drunk, without any warning or notice, started the steam winch with a jerk, when the fall rope, attached both to the winch and the boiler plate, parted; that the boiler plate fell against the crowbar which Nelson was using, causing it to be thrown across his foot, inflicting the injury hereinbefore stated. This evidence is amply sufficient to establish negligence. The mate was a vice principal. *Tills v. Great Northern R. Co.*, 50 Wash. 536, 97 Pac. 737. The admission of Exhibit A in evidence is urged as error, for the reason that its execution by the appellant company is not proven. It purports to have been signed by the appellant company, and the undisputed evidence shows that the ship was operated under it, as construed by the parties to the contract; that the appellant corporation received its share of the profits resulting from the operation of the ship. Moreover, without it there was abundant evidence to establish the relation of master and servant

between the appellant corporation and the ship captain. We conclude, therefore, that this contention is without merit.

In view of the error in rejecting testimony tending to show that the appellant Nelson incurred no liability for surgical or hospital fees, the cause will be reversed, and if the appellant Nelson elects to accept \$1,825, and costs in the court below, within ten days after the remittitur is filed there, a new judgment will be entered for that amount against the appellant corporation. Otherwise a new trial is granted. Neither appellant will recover costs in this court. The case will be affirmed as to the respondent, and it will recover its costs from the appellants.

FULLERTON, CHADWICK, DUNBAR, MOUNT, and CROW, JJ.,
CONCUR.

[No. 7284. Decided March 17, 1909.]

TITLE GUARANTY & TRUST COMPANY OF SCRANTON, PENN-
SYLVANIA, *Appellant*, v. DAVID A. MURPHY *et al.*,
Respondents.¹

INDEMNITY—BONDS—BUILDING CONTRACTS—DEFAULT OF CONTRACTOR—COMPLETION OF BUILDING BY OWNER—LIABILITY. Indemnitors, who give a bond to a surety company to indemnify it against loss upon a contractor's bond guaranteeing the construction of a building contract, are liable over to the surety company for the amount it was compelled by judgment to pay on default of the contractor, where the owner, under the terms of the building contract, took possession and completed the building, putting another in charge of the construction without withholding the contract price until completion, although the indemnitors were not parties to agreements made with the surety company consenting to that arrangement; since the contract gave the owner the right to so do without such consent, the two bonds, the contract, and the plans and specifications definitely referring to each other and being all one transaction, and authorizing all that the owner did to complete the building himself.

¹Reported in 100 Pac. 315.

Mar. 1909]

Opinion Per MOUNT, J.

SAME. In such a case, the indemnitors are not discharged because the building, which was to be a "brick veneer," was referred to in the indemnitor's bond as a "two-story frame dwelling," it being the same building described in the contract, and properly described either way.

Appeal from a judgment of the superior court for King county, Tallman, J., entered September 25, 1907, upon findings in favor of the defendants, in an action upon an indemnity bond, after a trial before the court without a jury. Reversed.

Graves, Palmer & Murphy, for appellant.

Farrell, Kane & Stratton, for respondent Sullivan.

MOUNT, J.—This action was brought by the plaintiff to recover upon an indemnity bond. Judgment was rendered in favor of the defendants in the court below, and the plaintiff appeals.

It appears that on or about September 26, 1904, one E. G. Bort, a builder, entered into a contract to furnish materials and construct a two-story dwelling house, in the city of Seattle, for Mrs. Emily Smith, for a consideration of \$4,400. Before entering into the contract Mrs. Smith required of the contractor a surety company's bond in the sum of \$2,000, conditioned that Mr. Bort would perform the contract. The Title Guaranty & Trust Company, for a consideration, furnished the bond, but before executing the same that company required an indemnifying bond, which was executed by the respondents as uncompensated sureties.

During the construction of the building, the contractor, Mr. Bort, became financially embarrassed, and neglected to pay certain bills for materials used in the building. Thereupon the materialmen filed liens and proceeded to foreclose the same against the building. These actions were brought against Mrs. Smith and her husband, who tendered the defense thereof to the Title Guaranty & Trust Company which in turn tendered the defense to the respondents, its indemni-

tors. The result was a judgment in favor of the lien claimants and against Mrs. Smith and her husband, who paid the judgment.

Mr. Bort, the contractor, at this time being in default and having suspended work on the building, was served with notice under the contract to proceed therewith in three days or the contract would be forfeited. Thereafter the contractor, the owner, and the Title Guaranty & Trust Company agreed that the unpaid indebtedness against the building amounted to about \$200, and estimated that \$500 additional would complete the building. They thereupon entered into a writing, to the effect that Mrs. Smith might pay these claims, and that one A. D. Phillips should remain in charge as foreman of the building until completion, and that the payment of accruing bills by the owner should not be considered as a waiver of any of the provisions of the bond.

Later another agreement to the same effect was entered into, but it was then estimated that \$1,400 would be necessary to complete the building, and that the owner had that amount which would be due upon the contract upon completion of the building. Still, later, when this money was expended and the building uncompleted, another agreement was entered into between the same parties, substantially the same as the other two above mentioned, except that the owner was authorized to furnish money to complete the building according to the original contract without waiving any of the provisions of the surety bond. Mrs. Smith subsequently did this, and expended altogether some \$3,950 more than the original contract price. These respondents, the indemnitors, were not parties to these last named agreements, and there is some evidence to the effect that one of them, at least, was not informed thereof.

After the building was completed, Mrs. Smith and her husband brought an action against the appellant on the surety bond for \$2,000, the full penalty thereof. The appellant tendered the defense to the respondents, who were indem-

Mar. 1909]

Opinion Per MOUNT, J.

nitors. The respondents accepted the tender, and by their attorneys defended the action, which resulted in a judgment in favor of Mrs. Smith, against the appellants in the sum of \$2,000 and costs. The respondents thereupon refused to pay the judgment obtained against the surety company in that action. The appellants thereupon brought this action upon the indemnity bond to recover the amount of the loss upon the guaranty bond. The trial court found that the respondents were not liable because, (1) there was a substitution of contractors; (2) a portion of the contract price was not withheld until completion of the building, as provided for in the original contract of construction; and (3) because the building constructed was a brick veneer building, instead of a frame building as described in the indemnity bond.

Assuming for the purposes of this case that the judgment obtained by Smith and wife against the appellants, which judgment the respondents unsuccessfully defended, was not binding upon the respondents, we are of the opinion, nevertheless, that the record does not sustain the findings upon which the trial court based its judgment of nonliability in this case. It is true that a stricter rule prevails in favor of a noncompensated surety than a compensated one. The former may stand upon the precise terms of his contract, which may not be extended by construction or implication to cover a case not within its provisions; but where there is no substantial deviation from the terms of the contract, the surety is bound in the one case the same as in the other. *Cowles v. United States Fidelity & Guaranty Co.*, 32 Wash. 120, 72 Pac. 1032, 98 Am. St. 838.

In this case Mr. Bort entered into a definite building contract with Mrs. Smith. The building was definitely described and located. The appellant here guaranteed the faithful performance of that contract, which was referred to and made a part of the guaranty bond. These respondents, in consideration of the execution of the guaranty bond by the appellants,

agreed to indemnify and save the appellants harmless on account of such guaranty. The building was referred to in the bond of indemnity as a "two-story frame dwelling, situated on Harvard avenue and Aloha street, owned by Emily E. Smith." These two bonds and the contract, together with the plans and specifications, were all one transaction. They definitely referred to and identified each other and, of course, must be construed as a whole. It is not claimed, as we understand the evidence, that a different building than the one agreed upon was erected; but it is claimed that, after Mr. Bort became financially embarrassed and had failed to perform his contract and after liens were being foreclosed, the agreements subsequently entered into between Mr. Bort and Mrs. Smith and the guaranty company made a new contract and substituted a new contractor for Mr. Bort, and that respondents were thereby released from their contract of indemnity. The original contract provided in express terms that, if the contractor, Mr. Bort, should fail to prosecute the work, thereupon the owner might give three days' notice of forfeiture and proceed to finish the building herself and pay the bills and deduct the cost thereof from the amount remaining due on the contract, and that if the cost exceeded the amount due on the contract, the contractor should repay the excess to the owner. It seems to be conceded, at any rate it is conclusively established, that, at the time these subsequent agreements were entered into, Mr. Bort had entirely failed and had forfeited his contract; and thereupon, in order to protect themselves as far as possible and for the benefit of the surety company and the indemnitors, the subsequent agreements were entered into. These agreements did not authorize anything to be done which was not required under the original contract. They did not change the original contract in any way. It is true another man was placed in charge of the work, and it was stipulated that money in the hands of the owner, which could not have been required until the comple-

Mar. 1909]

Opinion Per MOUNT, J.

tion of the work, might be advanced to pay for the work; but the owner under the express terms of the original contract, without any further agreement or consultation with the surety or the indemnitors, was fully authorized to do all these things. She was at liberty to employ other men and choose other materials and advance money to pay therefor, after forfeiture of the contract. The only effect of these agreements was to show that the owner and the contractor and the guarantor were working in harmony and not intending to waive any of the provisions of the original contract. We think it clear that they did not do so, and the liability of the indemnitors was not changed in the slightest.

It is also claimed that the building constructed was a "brick veneer building," while the building which was described in the contract of indemnity was a "two-story frame dwelling;" and therefore that the indemnitors are not liable on their contract of indemnity. It is not claimed that the building constructed was different from the one contracted for. The plans and specifications showed exactly what the building was, and that it was a brick veneer building. The guaranty bond referred to the building as a two-story frame residence, and also to the contract which described the building fully. The indemnity bond referred to the same building by reference to the guaranty bond. The evidence also makes it quite clear that such a building might properly be described either way. We are satisfied, therefore, that the two descriptions, though in technically different terms, referred to the same building.

We are clearly of the opinion that the respondents are liable under the facts shown. The judgment is therefore reversed, and the cause remanded with directions to the lower court to enter a judgment in favor of the appellant and against the respondents for the penalty named in the bond.

RUDKIN, C. J., FULLERTON, CROW, DUNBAR, GOSE, and CHADWICK, JJ., concur.

[No. 7883. Decided March 17, 1909.]

THE STATE OF WASHINGTON, *on the Relation of Jerry Dominick et al., Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, and MITCHELL GILLIAM, *Judge, Respondents.*¹

EMINENT DOMAIN—PUBLIC USE—ELECTRICAL POWER PLANT—SALE OF POWER FOR PUBLIC PURPOSES. The condemnation of a water power for the purpose of generating electricity to be sold to third persons and corporations for municipal and public lighting and for the operation of common carrying railroads is for a public use.

SAME—PERSONS ENTITLED—ELECTRIC POWER—USE OF SURPLUS. The fact that a corporation seeking to exercise the power of eminent domain to generate electric power for public use had complied with the law of 1907, p. 349, which seeks to authorize the use of surplus power for private purposes, does not affect its right to condemnation for the public purposes sought, whether the law of 1907 is constitutional or not; since the question as to the proper use of the surplus power does not affect the right to condemn for public uses.

Certiorari to review a judgment of the superior court for King county, Gilliam, J., entered December 23, 1908, decreeing a public use and necessity, in proceedings to condemn water rights for an electric power plant. Affirmed.

Elmer E. Todd, for relators. The condemning power company is seeking to take private property in violation of section 16, article 1, of the state constitution. *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681, 99 Am. St. 964, 63 L. R. A. 820; *State ex rel. Tacoma Industrial Co. v. White River Power Co.*, 39 Wash. 648, 82 Pac. 150, 2 L. R. A. (N. S.) 842; *State ex rel. Harris v. Superior Court*, 42 Wash. 660, 85 Pac. 666, 5 L. R. A. (N. S.) 672; *State ex rel. Tolt Power & Transp. Co. v. Superior Court*, 50 Wash. 13, 96 Pac. 519; *Varner v. Martin*, 21 W. Va. 534; *Fallsburg Power & Mfg. Co. v. Alexander*, 101 Va. 98, 43 S. E. 194, 99 Am. St. 855, 61 L. R. A. 129. The mere fact that the company declares in its articles of incorporation that it un-

¹Reported in 100 Pac. 317.

Mar. 1909]

Citations of Counsel.

dertakes to the state of Washington and to the inhabitants thereof the duties and obligations of a public service corporation does not make it a public service corporation. *Fallsburg Power & Mfg. Co. v. Alexander, State ex rel. Harris v. Superior Court*, and *State ex rel. Tolt Power & Transp. Co. v. Superior Court, supra*. If the act of 1907 is intended to give power companies the right to condemn for public uses and private uses combined, if those uses are so combined that they cannot be separated, the right of eminent domain cannot be invoked. *State ex rel. Harlan v. Centralia-Chehalis Elec. R. & P. Co.*, 42 Wash. 632, 85 Pac. 344, 7 L. R. A. (N. S.) 198; *State ex rel. Harris v. Superior Court, supra*; *Ryerson v. Brown*, 35 Mich. 333, 24 Am. Rep. 564; *Board of Health of Portage Tp. v. Van Hoesen*, 87 Mich. 533, 49 N. W. 894, 14 L. R. A. 114.

George Donworth, Harold Preston, and James B. Howe, for respondents, contended, *inter alia*, that the business of the petitioning company is a public business, and the property sought to be condemned is for a public use. *State ex rel. Harlan v. Centralia-Chehalis Elec. R. & P. Co.*, 42 Wash. 632, 85 Pac. 344, 7 L. R. A. (N. S.) 198; *State ex rel. Harris v. Superior Court*, 42 Wash. 660, 85 Pac. 666, 5 L. R. A. (N. S.) 672; *State ex rel. Harris v. Olympia L. & P. Co.*, 46 Wash. 511, 90 Pac. 656; *Inland Empire R. Co. v. McKinley*, 48 Wash. 675, 94 Pac. 644. The question of public use depends entirely upon the ultimate use and not upon the agency or intermediary. *Brown v. Gerald*, 100 Maine 351, 61 Atl. 785, 70 L. R. A. 472; *Lewis, Eminent Domain* (2d ed.), §§ 160, 161, 162, 416, 417, 420; *Avery v. Vermont Elec. Co.*, 75 Vt. 235, 54 Atl. 179, 59 L. R. A. 817; *Fallsburg Power & Mfg. Co. v. Alexander*, 101 Va. 98, 43 S. E. 194, 99 Am. St. 855, 61 L. R. A. 129. The right of eminent domain may be exercised by a company which is not to serve the public directly but is to furnish a needed facility to other public service corporations through which the public actually

enjoy the use. *State ex rel. National Subway Co. v. St. Louis*, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113; *Ryan v. Louisville & N. Terminal Co.*, 102 Tenn. 111, 50 S. W. 744, 45 L. R. A. 303; *Prince v. Crocker*, 166 Mass. 347, 44 N. E. 446; *Calor Oil & Gas Co. v. Franzell*, 33 Ky. Law 98, 109 S. W. 328; *Fort Street Union Depot Co. v. Morton*, 83 Mich. 265, 47 N. W. 228; *In re Niagara L. & O. Power Co.*, 97 N. Y. Supp. 853; *Riley v. Charleston Union Station Co.*, 71 S. C. 457, 51 S. E. 485, 110 Am. St. 579; *O'Hare v. Chicago etc. R. Co.*, 139 Ill. 151, 28 N. E. 923; *Southern Illinois & M. Bridge Co. v. Stone*, 174 Mo. 1, 73 S. W. 453; *Stone v. Southern Illinois & M. Bridge Co.*, 206 U. S. 267, 27 Sup. Ct. 615, 51 L. Ed. 105; *State ex rel. Trimble v. Superior Court*, 31 Wash. 445, 72 Pac. 89, 66 L. R. A. 897; 10 Am. & Eng. Ency. Law (2d ed.), p. 1052, 1053. It is immaterial to the right of condemnation for a public use that the legislature has failed to guarantee or regulate the rights of the public therein. *Minnesota Canal & Power Co. v. Pratt*, 101 Minn. 197, 112 N. W. 395, 11 L. R. A. (N. S.) 105; *State ex rel. Shropshire v. Superior Court*, 51 Wash. 386, 99 Pac. 3. The question as to whether the generation of electric power for commercial purposes is a public use is, outside of this state, a divided question. The following cases favor the doctrine of public use. *Rockingham County L. & P. Co. v. Hobbs*, 72 N. H. 531, 58 Atl. 46, 66 L. R. A. 581; *Walker v. Shasta Power Co.*, 160 Fed. 856; *Grande Ronde Elec. Co. v. Drake*, 46 Ore. 243, 78 Pac. 1031; *Minnesota Canal & Power Co. v. Koochiching*, 97 Minn. 429, 107 N. W. 405, 5 L. R. A. (N. S.) 638; *Minnesota Canal & Power Co. v. Pratt*, *supra*; *Hollister v. State*, 9 Idaho 8, 71 Pac. 541. Against the public use are the following cases: *Avery v. Vermont Elec. Co.*, and *Fallsburg Power & Mfg. Co. v. Alexander*, *supra*. Where a condemnation is made for public use, a mere incidental or temporary use of a part of the property for a private purpose, so long as the public use is maintained, will not deprive the enterprise of its public char-

Mar. 1909]

Opinion Per RUDKIN, C. J.

acter. *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.*, 142 U. S. 254, 12 Sup. Ct. 173, 35 L. Ed. 1004; *Rundle v. Delaware etc. Canal Co.*, 14 How. 80, 14 L. Ed. 335. Necessity does not mean absolute necessity, but reasonable necessity depending upon the circumstances of the particular case. 10 Am. & Eng. Ency. Law (2d ed.), p. 1057; *State ex rel. Kent Lumber Co. v. Superior Court*, *supra*; *Sayre v. Orange* (N. J.), 67 Atl. 933; *Tracy v. Elizabethtown etc. R. Co.*, 80 Ky. 259; *Hayford v. Bangor*, 102 Me. 340, 66 Atl. 731, 11 L. R. A. (N. S.) 940. The legislature has almost unlimited power in fixing the terms and conditions upon which condemnations may be made. *Richardson v. Centerville* (Iowa), 114 N. W. 1071. Not only the present, but the reasonable future needs of the enterprise must be regarded in any question of necessity. 2 Lewis, Eminent Domain (2d ed.), p. 894; *Nicomen Boom Co. v. North Shore etc. Co.*, 40 Wash. 315, 82 Pac. 412; *State ex rel. Ami Co. v. Superior Court*, 42 Wash. 75, 85 Pac. 669; *State ex rel. Liberty Lake Irr. Co. v. Superior Court*, 47 Wash. 310, 91 Pac. 968; *Harlem River etc. Co. v. Arnow*, 47 N. Y. Supp. 438; *Pittsburgh etc. R. v. Peet*, 152 Pa. St. 488, 25 Atl. 612, 19 L. R. A. 467; *O'Hare v. Chicago etc. R. Co.*, *supra*; *In re New York etc. R. Co.*, 77 N. Y. 248.

RUDKIN, C. J.—The petitioner is a corporation, organized under the laws of this state for the purpose of generating and transmitting electrical current and electrical power for uses claimed to be public, within the purview of our constitution. As such corporation it instituted this proceeding in the court below to condemn and appropriate the waters of White river flowing past certain lands belonging to the defendants. The uses and purposes to which the electricity generated and transmitted are to be applied are thus set forth in the findings of the court:

“Said electricity and electric power so to be manufactured by said petitioner will be transmitted by said petitioner and

used and disposed of by said petitioner as follows, and for the following purposes, namely:

"By means of lines of poles with wires and wire cable strung thereon, and other appropriate apparatus and appliances, said petitioner will transmit said electricity (otherwise called electric power) from the point where the same is so manufactured by water power into numerous and various cities and towns in the state of Washington, and in said cities and towns, by like means of transmission and delivery, said petitioner will furnish, sell and deliver said electricity to such cities and towns for lighting streets and public buildings, and for the operation of municipal electric lighting systems maintained by such cities and towns; and in such cities and towns said petitioner, as a public service electric lighting corporation, carrying on the business of general public electric lighting, will also sell, distribute and deliver said electricity in the form of electric light, or current therefor, to private citizens, partnerships and corporations for use in their homes, stores, shops, manufactories, and other business places for lighting the same, said electricity being by said petitioner so delivered and distributed in the business of general public electric lighting by means of lines of poles with wires and wire cables strung thereon, and other appropriate apparatus and appliances, erected and constructed chiefly in and along and over the public streets of such cities and towns, and also by underground conduits in and under such streets with wires and wire cables laid and constructed therein, and other appropriate appliances, under and by virtue of franchises granted and to be granted to said petitioner, or to the assignors of said petitioner, and now vested or hereafter to be vested in said petitioner, and so granted by such cities and towns by ordinances duly and lawfully passed by such cities and towns. And said petitioner will also transmit, furnish, sell and deliver said electricity within the state of Washington to other public service electric lighting corporations lawfully doing business in the state of Washington, and holding valid franchises as aforesaid from cities and towns in said state, and having contracts with said cities and towns, under such conditions that the said electricity will be furnished and supplied by such other corporations within the state of Washington in the form of electric light or current therefor for lighting streets and for carrying on the business of general public

Mar. 1909]

Opinion Per RUDKIN, C. J.

electric lighting in cities and towns under franchises therein, in the same manner as hereinbefore in this paragraph set forth. And said petitioner will also transmit, furnish, sell and deliver said electricity to corporations owning and operating railroads and railways in the state of Washington, said railroads and railways being common carriers of passengers and goods, to be used for operating said railroads and railways within the state of Washington by electric power, in order to enable said corporations to discharge their public functions as common carriers by the operation of their trains and cars by said electric power. And said petitioner, as a public service corporation, may also use said electricity and electric power within the state of Washington for any other public use within the said corporate objects of said petitioner hereinbefore set out, provided, such other public use is really a public use under the valid laws and constitutional provisions in force in the state of Washington. As to all uses which shall be made of said electricity, said petitioner is and will be a public service corporation and has assumed all the duties and obligations applicable to public service corporations."

The court adjudged that the contemplated use was a public use and that the public interest required the prosecution of the enterprise. This order is now before us for review, and the assignments of error present the question whether the contemplated use is a public one. In so far as the electricity generated is to be used for public and municipal lighting, and in the operation of railroads and railways, through the direct agency of the respondent itself, there can be no doubt that the use is public. *State ex rel. Harlan v. Centralia-Chehalis Elec. R. & P. Co.*, 42 Wash. 632, 85 Pac. 344, 7 L. R. A. (N. S.) 198; *State ex rel. Harris v. Superior Court*, 42 Wash. 660, 85 Pac. 666, 5 L. R. A. (N. S.) 672.

No such question as this was presented for consideration in *State ex rel. Tacoma Industrial Co. v. White River Power Co.*, 39 Wash. 648, 82 Pac. 150, 2 L. R. A. (N. S.) 842, cited by the relator. There the condemning corporation was authorized to own and operate mills and factories, to sell

electrical energy for power purposes etc., and insisted that it had the right to exercise the power of eminent domain in aid of such enterprises. It insisted, in other words, that the term *public use* is synonymous with *public benefit*. This court ruled otherwise, and the entire discussion in the opinion relates to that one question.

Does the fact that the respondent will sell and deliver a portion of its electrical power to third persons and corporations to be by them used for public and municipal lighting and in the operation of railroads and railways afford a sufficient reason for denying to it the right of eminent domain? We think not. Courts look to the substance rather than the form, to the end rather than to the means. If in the end the property is devoted to a public use, the mere agency or instrumentality through which that result is accomplished is a matter of no concern. Thus a railroad company which has leased its road and equipment may still exercise the power of eminent domain, because the property is devoted to a public use through its lessees. *State ex rel. Trimble v. Superior Court*, 31 Wash. 445, 72 Pac. 89, 66 L. R. A. 897. The same rule has been applied to condemnations for union depots, bridges, pipe lines, conduits, subways, etc., where the public use the property through agencies claiming through or under the condemning party. *Fort Street Union Depot Co. v. Morton*, 83 Mich. 265, 47 N. W. 228; *Riley v. Charleston Union Station Co.*, 71 S. C. 457, 51 S. E. 485, 110 Am. St. 579; *Southern Illinois & M. Bridge Co. v. Stone*, 174 Mo. 1, 73 S. W. 453, 63 L. R. A. 301; *Stone v. Southern Illinois & M. Bridge Co.*, 206 U. S. 267, 27 Sup. Ct. 615, 51 L. Ed. 1057; *Calor Oil & Gas Co. v. Franzell*, 33 Ky. Law 98, 109 S. W. 328; *State ex rel. National Subway Co. v. St. Louis*, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113; *Prince v. Crocker*, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610.

It is argued that the respondent will have no control over the electricity after sale, and that it may then be used for private purposes by its grantees. This same argument ap-

Mar. 1909]

Opinion Per RUDKIN, C. J.

plies to the respondent itself though perhaps with less force. But as said by this court in *State ex rel. Harlan v. Centralia-Chehalis Elec. R. & P. Co.*, *supra*:

"Measured by these tests, there can be no question as to the purposes of the respondent corporation; for both its application and the testimony show that it desires this power that it may further its business as a common carrier. But while the exercise of this right of eminent domain must be guarded jealously, so that the private property of one person may not be taken for the private use of another, after all is said and done, the power to prevent property taken for a public use from being subsequently diverted to a private use must rest rather in the supervisory control of the state than in caution in permitting the exercise of the power. Property taken for a public use by a corporation organized solely to promote a public business may be as easily diverted by it to a private use as it may by one having both public and private objects. It is not the object for which a corporation is formed that prevents it from wrongdoing. The preventive rests in the power of the state to compel it to lawfully exercise its granted privileges."

We are therefore of opinion that so much of the electricity as is destined to be used for public and municipal lighting, and in the operation of common carrying railroads and railways, whether directly through the respondent or indirectly through its assignees or successors, is for a public use.

The petition for condemnation averred, and the court found, that the respondent had complied with the provisions of the act of March 13, 1907, Laws of 1907, p. 349, relating to corporations organized for the purpose of generating and transmitting electrical power for the operation of railroads and railways or for municipal lighting. Section 1 of that act reads as follows:

"Any corporation authorized to do business in this state, which, under the present laws of the state, is authorized to condemn property for the purpose of generating and transmitting electrical power for the operation of railroads or railways, or for municipal lighting, and which by its charter or articles of incorporation, assumes the additional right to

sell electric power and electric light to private consumers outside the limits of a municipality and to sell electric power to private consumers within the limits of a municipality, which shall provide in its articles that in respect of the purposes mentioned in this section it will assume and undertake to the state and to the inhabitants thereof the duties and obligations of a public service corporation, shall be deemed to be in respect of such purposes a public service corporation, and shall be held to all the duties, obligations and control, which by law are or may be imposed upon public service corporations. Any such corporation shall have the right to sell electric light outside the limits of a municipality and electric power both inside and outside such limits to private consumers from the electricity generated and transmitted by it for public purposes and not needed by it therefor: Provided, That such corporation shall furnish such excess power at equal rates, quantity and conditions considered, to all consumers alike, and shall supply it to the first applicants therefor until the amount available shall be exhausted: Provided further, That no such corporation shall be obliged to furnish such excess power to any consumer to an amount exceeding twenty-five per cent. of the total amount of such excess power generated or transmitted by it. In exercising the power of eminent domain for public purposes it shall not be an objection thereto that a portion of the electric current generated will be applied to private purposes, provided the principal uses intended are public: Provided, That all public service or quasi-public service corporations shall at no time sell, deliver and dispose of electrical power in bulk to manufacturing concerns at the expense of its public service functions, and any person, firm or corporation that is a patron of such corporation as to such public function, shall have the right to apply to any court of competent jurisdiction to correct any violation of the provisions of this act."

It is questionable whether the legislature intended by this act to merely enlarge or extend the uses that might be made of electricity generated for public purposes and not needed therefor, or whether it intended to enlarge the power of eminent domain itself. If the former was intended, the act would seem to be entirely free from constitutional objection, while in the latter case the validity of the act would be very

Mar. 1909]

Opinion Per RUDKIN, C. J.

questionable, under previous rulings of this court. But we do not feel called upon to determine that question in this case, for it does not appear that the respondent is attempting to acquire any property by virtue of the provisions of the act of 1907. It simply seeks to avail itself of the provisions of that act in order that it may use electricity generated for public purposes and not needed therefor, in the manner therein provided. If we should hold that the respondent could not use its surplus product in that way, such ruling would have no effect upon its right to condemn for public purposes. To what extent a public service corporation may use electricity generated for public purposes, for purposes heretofore denominated private, under the provisions of the act of 1907, or whether it can acquire property by condemnation to generate electricity to be disposed of under the provisions of that act, independent of its necessities as a public service corporation, can best be determined when some case is presented involving that concrete question.

Without undertaking to decide, therefore, what rights the respondent may have under the provisions of the act of 1907, the judgment of the court below is affirmed.

CHADWICK, GOSE, FULLERTON, MOUNT, and CROW, JJ.,
concur.

DUNBAR, J., took no part.

[No. 5699. Decided March 18, 1909.]

KING COUNTY, *Appellant*, v. CHARLES F. WHITTLESEY *et al.*,
Respondents.¹

BONDS—OFFICIAL BONDS—ACTIONS—SHORTAGE DURING SUBSEQUENT TERM—EVIDENCE—RELEVANCY—COUNTY TREASURERS. In an action upon the official bond of a county treasurer covering his first term of two years, to recover for a shortage during such term, books, records and accounts showing an entirely separate shortage during a second term following the first, are primarily irrelevant and inadmissible as proof of, or in corroboration of, the first term shortage; but their contents tending to explain certain items testified to on examination-in-chief are competent, if confined to throwing light on the first term.

SAME—EVIDENCE—CROSS EXAMINATION OF EXPERT. In an action upon an official bond, where the official's shortage rests upon the evidence of an expert accountant, cross-examination to discredit the witness and show mistakes in his accounting is legitimate, although going into matters of defense at variance with the theory permitted the plaintiff.

APPEAL—REVIEW—FINDINGS—CREDIBILITY OF WITNESS. In an action at law tried before the court without a jury, a finding of the trial court as to the credibility of a witness, who was discredited by cross-examination, will not be reversed on appeal, unless clearly against the evidence.

TRIAL—NONSUIT—CREDIBILITY OF WITNESS—PROVINCE OF COURT. Although the evidence of a witness for plaintiff makes out a *prima facie* case, the trial court sitting without a jury is not bound to believe the witness, and may grant a nonsuit where, on cross-examination, the witness was shown to be unreliable.

Appeal from a judgment of the superior court for King county, Wilmon Tucker, Esq., judge *pro tempore*, entered August 2, 1904, upon granting a nonsuit, after a trial before the court without a jury, dismissing an action upon an official bond. Affirmed.

Kenneth Mackintosh and *R. W. Prigmore*, for appellant.
Bausman & Kelleher, for respondents.

¹Reported in 100 Pac. 320.

Mar. 1909]

Opinion Per MOUNT, J.

MOUNT, J.—This action was brought by King county against C. F. Whittlesey, ex-county treasurer of the county, and the sureties on his official bond, to recover an alleged shortage of funds during his first term as treasurer. The shortage was alleged at \$28,004.94. The case was tried to a judge *pro tempore*, without the intervention of a jury. After the county had introduced its evidence and rested its case, the defendants moved the court for a nonsuit. This motion was granted, upon the ground that the evidence of a shortage was “incorrect and unreliable in such a multitude of particulars that it could not be considered as an evidence of any shortage in the case.”

It appears that Mr. Whittlesey was county treasurer of King county for two terms of two years each. The first term began on January 14, 1897, and ended on January 7, 1899. The second term began on January 7, 1899, and ended on the second Monday in January, 1901. During the last year of Mr. Whittlesey's incumbency of the office, the county employed a Mr. Grant, an expert accountant, to examine the books, papers, and records of the office. Mr. Grant, after several months at the work, made a statement and report to the effect that the treasurer was short in his accounts, in the sum of \$28,004.94 for the first term, and some \$10,000 for the second term. Thereafter two actions were begun against Mr. Whittlesey and the sureties on his official bonds, this action being the one against Mr. Whittlesey and forty-six others who were sureties on the official bond during his first term, the other action being against Mr. Whittlesey and a surety company. While these two actions were pending, a settlement was made in the last-named case, and it was dismissed.

Errors are assigned by the appellant as follows: (1) The court erred in refusing to permit appellant to introduce the books, records, and accounts relating to the second term, for the purpose of showing the actual condition of the whole

period of four years, as proof of and in corroboration of the first term shortage; (2) the court erred in permitting respondents, over appellant's objections and on cross-examination, to go into the second term books, records, and accounts, after appellant had been expressly forbidden to go into the same matters on direct examination; (3) that the court erred in permitting respondents, over appellant's objections and on cross-examination of the appellant's witnesses, to introduce evidence and go into matters of defense strictly upon a theory wholly at variance with and antagonistic to the one permitted appellant; (4) that the court erred in granting the nonsuit and entering judgment of dismissal thereon.

We think the court did not err in any of these particulars. The books relating to the second term of two years were not necessarily connected with the first term, and were primarily irrelevant to make a case against the respondents for a shortage in the first term. The contract of suretyship upon the official bond for the second term was entirely different, and the sureties were different, from those of the first term; and therefore whatever occurred in the second term was irrelevant to this case, except perhaps it might become material in explanation of disputed items or in cross-examination of the witnesses. The shortages for the two terms were entirely separate, and a shortage in one would not necessarily prove a shortage in the other. An accountant testified positively on direct examination that the shortage shown by the books in the first term amounted to the sum alleged, and had not been made up by the treasurer. This, of course, made a *prima facie* case in favor of the appellant. The contents of these books were used by respondents in cross-examination, as tending to explain certain items testified to in chief. We think they were properly used for that purpose, and the trial court so ruled when he said:

"The second term is only material in this case for the purpose of showing the actual condition of the accounts during

Mar. 1909]

Opinion Per MOUNT, J.

the first term. . . . I want it confined during the second term to anything that will throw light on the first term."

The whole case of appellants rests upon the evidence of the witness Grant. His testimony was long. It involved hundreds of items. It extends over more than one thousand pages of the record, mostly taken up in cross-examination, calculated to show errors in his statement and report. We think the respondents, under the examination-in-chief and under the denials in the answer, had a right to show these errors by that witness. They certainly had a right to discredit the witness if they could by cross-examination, and show that he had made mistakes in his reports, or that they were incorrect. The cross-examination is legitimate, and we find no error therein.

It is next argued that the court erred in granting the nonsuit. This requires a consideration of the evidence. The trial court, who saw and heard the witness upon whose evidence the appellant wholly relied, and who was required to pass upon the credibility of the witness, in deciding the case, stated:

"Mr. Grant's report was relied upon solely and it has been shown to be incorrect and unreliable in such a multitude of particulars that it ought not to be considered as evidence of any shortage in this case."

This shows that the trial court, whose duty it was to weigh the evidence in the light of the credibility of the witness, was not satisfied to base a judgment thereon. We have frequently held in such cases that we will not reverse the finding of the trial court unless clearly against the evidence. *Duteau v. Barto*, 48 Wash. 207, 93 Pac. 220; *Johnson v. Great Northern Lumber Co.*, 48 Wash. 325, 93 Pac. 516. While the direct evidence of the witness made a *prima facie* case, his cross-examination showed conclusively that there were many errors in his report, and that it was therefore unreliable. Under these conditions, the court was not

bound to believe the witness or to rely upon the statements or reports made by him.

The judgment must therefore be affirmed.

CROW, DUNBAR, CHADWICK, and GOSE, JJ., concur.

FULLERTON, J., concurs in the result.

[No. 7433. Decided March 19, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v. CHARLES
CHURCHILL, *Appellant*.¹

HOMICIDE—SELF DEFENSE—EVIDENCE—FIGHT WITH DECEASED. Upon a plea of self defense, evidence of a fight between deceased and the accused, two hours before the homicide, is admissible as a circumstance from which malice might be inferred.

CRIMINAL LAW—APPEAL—HARMLESS ERROR. In a prosecution for manslaughter, it is harmless error to admit in evidence the details of a previous fight between the deceased and accused where the same was favorable to the accused.

HOMICIDE—EVIDENCE. An assignment of error in excluding evidence of the details of a fight between the deceased and accused is without merit where the details were not presented by the state, the conversation sought to be brought out was not part of the *res gestae*, and the accused was permitted to go into the details of the fight.

SAME—SELF DEFENSE—EVIDENCE. Where the accused claimed that the killing was in self defense and that deceased advanced with his hand behind his back as if in the act of drawing a weapon, it is admissible for the wife of the deceased to testify that her husband never owned a revolver, as a circumstance tending to show that the accused was not in actual danger, and that the deceased was not armed, to offset cross-examination seeking to establish that a weapon had subsequently been taken from deceased.

SAME—CLOTHING OF DECEASED. Upon the plea of self defense the clothing of the deceased worn at the time of the shooting is admissible upon an issue as to whether the deceased was in a striking attitude when shot.

SAME—DISPOSITION OF DECEASED. It is not error to exclude evidence of fights and quarrels which the deceased had had with others, where it does not appear that the accused was informed thereof and the evidence does not go to the point as to who was the aggressor.

¹Reported in 100 Pac. 309.

Mar. 1909]

Syllabus.

SAME—REPUTATION OF DECEASED. Upon an issue of self defense it is not error to exclude evidence of the reputation of deceased as to "using unfair means in fights", as calling for the conclusion of the witness; especially where the witness testified to his reputation as a "gun fighter."

CRIMINAL LAW—TRIAL—READING EVIDENCE. It is not reversible error for the prosecuting attorney to read a correct copy of the evidence to the jury, where the court at the time instructed that the jury were the exclusive judges of what the testimony was.

HOMICIDE—SELF DEFENSE—INSTRUCTIONS. Where the only evidence as to deceased's carrying a gun was a statement on cross-examination that none was found on his body and evidence of his wife that he never owned any, it is not error to refuse to instruct that such evidence was to be considered only to determine whether he was a dangerous man; since it also bore upon the question whether accused was in actual danger.

SAME—APPEARANCE OF DANGER. Instructions on the right of self defense are correct where they authorize the accused when attacked to act upon reasonable appearances of danger, judged from the accused's standpoint.

SAME. The criterion of apparent danger is the situation as viewed from defendant's standpoint, or danger apparent to his comprehension as a reasonable man in his situation.

SAME—BELIEF IN DANGER. An instruction as to the right of the accused to act in self defense if in the "honest belief" of danger, is equivalent to requiring a "reasonable belief," and both may be used conjunctively.

SAME—BODILY HARM. An instruction on self defense properly requires apparent danger of "great" bodily harm.

CRIMINAL LAW—APPEAL—INSTRUCTIONS. Error cannot be predicated upon the failure of the court to define the word "feloniously," in the absence of any request therefor.

SAME—KNOWLEDGE OF ACCUSED. An instruction upon self defense directing the jury to consider "all" the facts and circumstances bearing on the question and surrounding defendant at the time, sufficiently includes defendant's "knowledge derived from personal observation."

HOMICIDE—SELF DEFENSE. A simple assault or an ordinary battery do not justify the taking of life in self defense.

CRIMINAL LAW—TRIAL—INSTRUCTIONS. It is not error to repeat the instructions on request of the jury.

SAME. It is not error to refuse an instruction which, in legal meaning and effect, has already been given.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered January 29, 1908, upon a trial and conviction of manslaughter. Affirmed.

Henry J. Snively, for appellant.

J. Lenox Ward (*Henry H. Wende* and *Harcourt M. Taylor*, of counsel), for respondent.

Gose, J.—The defendant was charged with the crime of murder in the first degree. The jury found him guilty of the crime of manslaughter. From a judgment on the verdict he prosecutes this appeal.

Seventeen errors are assigned, which will be treated in the order in which they are presented.

(1) "The court erred in permitting the details of the fight between Churchill and Zeigler, which took place in the Eagle saloon on the afternoon of the killing, to be received in evidence against defendant's objections." The objection is not well taken; (1) because the evidence admitted simply showed that a fight occurred between deceased and the appellant a few hours before the homicide, and that the deceased was the aggressor; (2) it was admissible as a circumstance from which the jury might infer malice on the part of the appellant; (3) if we concede that it was error, it was harmless in that it was favorable to the appellant, and does not require reversal. 1 Bishop, New Criminal Procedure, § 1276.

"It would have been proper upon the part of the prosecution in establishing its case in chief to have proven previous trouble between these parties, for the purpose of showing the existence of malice in the heart of the defendant when the killing took place. Such being the fact, it was certainly entirely proper for the prosecution to examine into the question, when it had already been touched upon by the defense. If the inquiry addressed to the woman as to the nature of this trouble to which she referred had developed the fact that a physical encounter had at some time in the past taken place between these men, the competency and admissibility

Mar. 1909]

Opinion Per Gose, J.

of such evidence could not be questioned for a moment. Such being the rule of law, it is evident that the question asked was entirely proper. If it be conceded, for present purposes only, that the answer went too far, and entered too much into detail, then defendant's remedy was by motion to strike out, and an exception to the ruling of the court in allowing the question would not meet the difficulty. To indicate the state of mind of the defendant at the time of the killing, the prosecution is always entitled to show any previous difficulties or troubles that have arisen between the parties, and this showing is not limited to physical encounters, but may consist solely in an affray of words; and this character of evidence is admissible, however much it may tend to disgrace and injure the defendant in the estimation of the jury. An objection to its admission upon such ground is not at all tenable. At the same time, this character of evidence may not be introduced in detail." *People v. Colvin*, 118 Cal. 349, 50 Pac. 539.

(2) "The state, against the objection of the defendant, was permitted by the court to go into full details of the fight between the deceased and the defendant in the Eagle saloon; but, when defendant endeavored to go into details of this fight, the state objected and the court rejected the evidence, to which the defendant excepted." This assignment is without merit, for the following reasons: (1) We have shown that the details of the fight were not presented to the jury by the state; (2) the conversation between the deceased and the barkeeper was not part of the *res gestae*; (3) the appellant was permitted to go into details of the fight occurring in the afternoon preceding the homicide, and present evidence to the jury showing that the deceased violently threw a beer glass on the bar, turned to the appellant, who theretofore had not spoken to him, thereupon applied an abusive epithet to the appellant, and then struck him.

(3) "The court erred in permitting Mrs. Anna Zeigler, the wife of the deceased, to testify that her husband did not own a revolver." The appellant admitted the killing, but

justified on the ground of self-defense. The testimony is without conflict in that it shows that the deceased was the aggressor. Practically all the witnesses testified that at the time of the shooting the deceased was advancing toward the appellant. There is evidence tending to show that at such time the deceased had his right hand behind him as if in the act of drawing a weapon. The right of self-defense is grounded upon two elements; (1) that the party attacked may use sufficient force to offset the actual danger; (2) that he may use sufficient force to offset the apparent danger. The evidence was admissible as a circumstance tending to prove, (1) that the appellant was not in any actual danger. *State v. Lattin*, 19 Wash. 57, 52 Pac. 314; 6 Ency. Evidence, 758; 21 Cyc. 970-1; (2) that the deceased was not armed at the time of the fatal encounter. Moreover, the appellant had theretofore interrogated one of the state's witnesses as follows:

"Question: Did you see anybody search his [deceased's] pockets? Answer: No, sir. Q. Did you see anybody take anything from the pockets or from the person? A. No, sir."

This cross-examination could have had only one purpose, viz., to impress upon the minds of the jury the belief that some one took some weapon from the pockets of the deceased just after the killing. The examination of Mrs. Anna Zeigler upon this point was as follows: "Q. Now, during all the time that you lived in or about North Yakima, did or did not ever your husband own a revolver? A. No, sir."

In *People v. Powell*, 87 Cal. 348, 361, 25 Pac. 481, 11 L. R. A. 75, it is said:

"The prosecution was allowed, over the objection of the defendant, to prove in rebuttal that the deceased was not in the habit of carrying arms; that on various occasions he had so stated; and that, on the morning of the shooting, he had refused to go armed, when it was suggested that he had better do so. We have looked in the transcript in vain for any evidence on the part of the defendant which could justify

Mar. 1909]

Opinion Per Gose, J.

or call for such evidence in rebuttal. There was evidence tending to show that the defendant believed the deceased to have been armed at the time he shot him. This rendered it competent for the prosecution to prove that, as a matter of fact, he was not armed at that time,”

(4) “The court erred in permitting the state in its case in chief to introduce the clothing worn by the deceased at the time of the shooting.” It is urged that this was error because there was blood on the clothing. The issue was sharply drawn as to whether the deceased was in a striking attitude when the fatal shot was fired. Under such an issue, the clothing was clearly admissible as evidence under the authorities cited by the appellant. 6 Ency. Evidence, 672-3; *Christian v. State*, 46 Tex. Cr. App. 47, 79 S. W. 562.

“The clothing worn by the deceased at the time of the shooting and the gun with which the shooting was done, were admitted in evidence over the objection of the defendant, and this is assigned as error. We think that the state was entitled to introduce them, and that no error was committed in permitting the jury to take them to their room when they retired to consider their verdict.” *State v. Cushing*, 14 Wash. 527, 45 Pac. 145, 53 Am. St. 883.

(5) The refusal of the court to permit the appellant to prove particular fights and quarrels which the deceased had engaged in with third parties before the homicide is assigned as error. In support of this assignment the appellant has called our attention to Vol. 6, Ency. Evidence, 769. Under the rule announced by this authority, the evidence was not competent because it does not appear that the appellant had any knowledge of such facts. In *People v. Powell*, *supra*, in discussing this question, the court say at page 361:

“On cross-examination of one or more of the witnesses for the prosecution, the defendant asked whether the deceased had not had quarrels with several persons named, and it was admitted that the deceased had so stated. There was no objection to this evidence by the prosecution. It was clearly incompetent, and, if it had been objected to, would no doubt have been excluded.”

The evidence shows that, on the day of the homicide, the deceased was drinking. The court gave the appellant wide latitude in presenting evidence to the effect that at such times he was generally reputed to be violent and dangerous. It does not go to the point as to who was the aggressor, because in this respect the evidence of the state and that of the defendant are in harmony. The entire evidence shows, as we have said, that the deceased was the aggressor. The real issue was whether at the time the appellant fired the fatal shot he had reasonable ground to believe that he was either in actual or apparent danger of death or great bodily harm.

(6) Error is assigned in that the court sustained an objection to the following question propounded by the appellant:

"Mr. Bonnell, do you know the reputation of the deceased at any time before his death in this community? I mean, his general reputation as a man who when drinking used unfair means in any fights that he got into?"

Thereupon the appellant was permitted to examine the witness as follows:

"Q. I wish to ask you if you know during his life time the general reputation of the deceased as being a reckless, dangerous, and violent fighter? A. Yes, sir. Q. What was it? A. Must I explain what my— Q. Was he a reckless, dangerous fighter or not? A. He was dangerous."

The appellant urges that the ruling is error under the rule announced in *State v. Ellis*, 30 Wash. 369, 70 Pac. 963. In that case an objection was sustained to the following question propounded by the defendant:

"Do you know the general reputation and the habit of the deceased, during the times, and in the communities you have stated, as to resorting to the use of fire-arms and other deadly weapons when engaged in quarrels?"

At page 373, the court say:

"But it is apparent that a man who habitually carries and uses such weapons in quarrels must cause greater apprehen-

Mar. 1909]

Opinion Per Gose, J.

sion of danger than one who does not bear such reputation and does not have such habits."

The question whether the deceased would resort to unfair means simply calls for the conclusion of the witness. Whether he had the reputation of being a "gun fighter" is a fact, and, as we have seen, the appellant was permitted to make full inquiry of the witnesses along this line.

(7) The prosecuting attorney was permitted against the appellant's objection to read to the jury what he stated was a copy of the appellant's testimony in the case. This is assigned as error. The court in ruling upon the objection remarked: "The jury will judge what the testimony is. They are the exclusive judges of what the testimony has been."

"There is no contention in the case that the evidence read by the prosecuting attorney was not the evidence of the witness. No prejudice, therefore, could result." *State v. Costello*, 29 Wash. 366, 69 Pac. 1099.

(8) Error is assigned in the refusal of the court to give the appellant's proposed instruction 14, particularly the following:

"Any evidence tending to show, if you find there is any such, that deceased did not own or carry a revolver, is only to be considered by you in determining whether or not deceased was a dangerous man, and was admitted solely for this purpose."

The quoted part is not a correct statement of the law, as applied to the case at bar. The only evidence as to whether the deceased had a gun was that elicited on cross-examination that none was found on his body, and the testimony of the deceased's wife that he did not own a gun. The jury had a right to consider this evidence on the question as to whether the appellant was in actual danger at the time of the shooting.

(9) Error is assigned on instructions 5 and 6, which the court gave the jury. They are in the following language:

"(5) A person attacked at a place where he has a right to remain need not retreat but may repel force by force in defense of his person against one who, at the time, is actually or apparently, intending or endeavoring unlawfully to kill him, or inflict upon him great bodily harm, and in such defense the assailed may lawfully meet the attack made upon him in such a way and with such force as under all the circumstances he at the moment honestly believes and has reasonable grounds to believe are necessary to save his own life, or to protect himself from great bodily harm and in such defense the assailed may lawfully kill the assailant, if at the time he is actually or apparently in imminent danger of death or great bodily harm at his assailant's hands, and if under all the circumstances, he honestly believes and has reasonable grounds to believe such killing to be necessary to save his own life, or protect him from great bodily harm.

"(6) But the rule of law is different when the attack is not felonious in character, that is, when from the attack there is no real or reasonably apparent danger of death or great bodily harm to the assailed. A person assailed has no right to take the life of his assailant even if he believes his own life in danger when the assault is without a weapon of any kind and when there is no reasonable ground for the belief by the person attacked that his person is in imminent danger of death or great bodily harm, but that an ordinary battery is all that is intended and all that he has reasonable ground to fear from the acts of his assailant, while a person is not bound to retreat from a place where he has a right to remain and may lawfully repel a threatened assault and to that end may use force enough to repel the assailant, yet he has no right to repel a threatened assault with naked hands by the use of a deadly weapon in a deadly manner, unless he honestly believes and has reasonable grounds to believe that he is in imminent danger of death or great bodily harm."

The evidence, as we have stated, clearly established the fact that at the time of the killing the deceased had made an attack on the appellant, and that he had struck at him or struck him. The points of objection are, (1) error in the use of the word "attacked;" (2) that they did not sufficiently define the right of the appellant to act upon the danger

Mar. 1909]

Opinion Per Gose, J.

as it appeared to him; (3) that the use of the words "honestly believes" makes the instruction objectionable; (4) that the words "bodily harm," and not "great bodily harm," should have been used. The court also instructed the jury as follows:

"However, an assault with the naked fist is sufficient to justify killing in self-defense if there is at the time a reasonably apparent purpose by the assailant to inflict death or great bodily harm upon assailed, and if the latter at the time believes and has reasonable grounds to believe that he is in imminent danger of death or great bodily harm at the hands of the assailant, supposing that the person assailed acts reasonably and as a reasonable man under the circumstances, as such circumstances at the time in good faith appear to him.

"The term apparent danger means not apparent danger in fact, but apparent danger to defendant's comprehension, as a reasonable man situate as he was situated. That is, did defendant believe and have reasonable grounds to believe that he was in imminent danger of death or great bodily harm at the time of the alleged killing?

"The court instructs you that though mere threats are insufficient to justify a killing in self-defense, if the jury believe that prior to the alleged homicide, deceased made threats of a violent nature against defendant, and the evidence leaves the jury in doubt as to what the acts of the deceased were at the time of the alleged homicide, or as to what defendant might properly have apprehended in respect to the intentions of deceased, the jury are entitled to consider the threats in connection with the other evidence in determining who was probably the aggressor, and in determining what apprehension might reasonably arise in the mind of the defendant from the conduct of the deceased, as such conduct appeared to the defendant. . . .

"To justify killing in self defense there need be no actual or real danger to the life or person of the party killing, but there must be or reasonably appear to be at or immediately before the killing some overt act of the person killed which, either by itself, or coupled with words, facts or circumstances, then or theretofore occurring, reasonably indicate to the party killing that the person slain is at the time endeavoring to kill him.

oring or immediately to endeavor to kill him or inflict upon him great bodily harm and he must honestly believe, upon reasonable grounds, that he is in imminent danger of such death or great bodily harm.

"It is not necessary however to justify the use of a deadly weapon that the danger be actual. It is enough that it be an apparent danger, such an appearance as confronting a reasonable person would induce him to believe that he was being assailed and that he was in immediate danger of death or great bodily harm, at his assailant's hands. Upon such appearances one may act with safety, and will not be held accountable, though it should afterwards appear that the indications upon which he acted were wholly fallacious and that he was in no actual danger.

"(a) I instruct you that every man has a right at any time to use a public street as such in the lawful and peaceful pursuit of his own affairs.

"(b) The fact, if it be a fact, that defendant was armed with a revolver does not forfeit his right of self defense. The question is was he excusable and justifiable in using a revolver under the circumstances and not whether or no he was justifiable and excusable in having one at the time of the shooting, if you find there was a shooting. By the circumstances I mean the circumstances as they appeared to defendant at that time. . . .

"It is for you to determine whether or not defendant had reasonable ground to apprehend imminent death or great bodily harm and in deciding that question you should judge from defendant's standpoint at the time of the shooting, if there was any shooting, that is to say you should take into consideration all the facts and circumstances bearing on the question and surrounding defendant and existing at or prior to the time of the alleged shooting, as said facts and circumstances are disclosed by the testimony, including Zeigler's bad character and threats, if they have been proved."

As to the use of the word "attacked," the appellant cites: *Patillo v. State*, 22 Tex. App. 586, 3 S. W. 766; *Gonzales v. State*, 28 Tex. App. 130, 12 S. W. 733; *Poole v. State*, 45 Tex. Cr. App. 348, 76 S. W. 565; *Terry v. State*, 45 Tex. Cr. App. 264, 76 S. W. 928; *Brady v. State*, 43 Tex.

Mar. 1909]

Opinion Per Gose, J.

Cr. App. 76, 65 S. W. 521; *Nix v. State* (Tex. Cr. App.), 74 S. W. 764; *Francis v. State* (Tex. App.), 55 S. W. 488.

In *Patillo v. State*, *supra*, at page 593, it is said:

"It is a rule, not only statutory, but of almost universal acceptation, that a party may act upon reasonable appearances of danger, and that whether the danger is apparent or not is always to be determined from defendant's standpoint."

In *Gonzales v. State*, *supra*, at page 135, it is said:

"In explaining the rule as to apparent danger, it does not distinctly direct the jury that the danger must be judged of from the defendant's standpoint, . . .

In *Poole v. State*, *supra*, page 365, it is said:

"As we understand the evidence on the part of the appellant, there was no actual attack by deceased on appellant at the time of the homicide, but there was preparation to attack."

In *Terry v. State*, *supra*, page 273, the court say:

"The court properly presented the law of actual attack, but failed to present the law of apparent danger."

In *Brady v. State*, *supra*, page 522, the court say: "There had been no attack by deceased, . . ." In the last case the deceased was some distance from the defendant and was advancing with an open knife, his remarks indicating that he was intending to make an attack. In *Nix v. State*, *supra*, page 767, it is said: ". . . the testimony tends to show he was about to attack him, and had not actually consummated the attack." In *Francis v. State*, *supra*, page 489, it is said: "We think the court, in giving a charge on self defense, should have enlarged it to a joint attack by both deceased and his brother." It will be observed that these cases touch on the two questions, viz., the question of attack and the question of apparent danger, and that the instructions given in the case at bar are within the law announced by these cases in so far as the facts are applicable.

Second. The appellant urges that "in charging on self-defense and in that connection on threats made by deceased against defendant, the criterion of apparent danger is as the situation is viewed from the standpoint of the defendant and not as to the belief of danger by the jury." The court so charged in its instruction 8. On the question of the duty of the court to instruct as to apparent danger, our attention has been directed to *Adams v. State*, 47 Tex. Cr. App. 347, 84 S. W. 231. At page 356, the court say:

"The charge, instead of giving the reasonable appearance of danger, as viewed by defendant, leaves it to be viewed by the jury as they believe or view such danger."

Burton v. State, 85 Ark. 48, 106 S. W. 942, cited by the appellant, is inapplicable on the facts. *State v. Ellis*, 30 Wash. 369, 70 Pac. 963, is relied upon by the appellant. At page 374, it is said: "On the contrary, the apparent facts should all be taken together to illustrate the motives and good faith of the defendant at the time of the homicide."

In instruction 8, *supra*, the court said to the jury:

"The term 'apparent danger' means not apparent danger in fact, but apparent danger to defendant's comprehension as a reasonable man situate as he was situated."

Third. The appellant cites *Tillery v. State*, 24 Tex. App. 251, 5 S. W. 842, 5 Am. St. 882, in support of this contention. In discussing the meaning of the words "honest belief," at page 272, it is said:

"While it may be abstractly correct to require that the defendant's belief of the existence of danger should be an *honest* one, it is going too far, we think, to so instruct the jury, especially when such instruction is repeated so often, and especially, too, in view of the evidence in this case."

The court seems to have based its view, measurably at least, on the criminal code of the state. We fail to appreciate the difference in meaning between the expressions "honest belief" and "reasonable belief." They are used both conjunctively and disjunctively by different courts. Just how a

Mar. 1909]

Opinion Per Gose, J.

belief can be reasonable and not be an honest belief as applied to the law of self-defense, we do not perceive, nor does counsel seek to give us light. Webster defines "reasonable" as meaning, "Just; honest." Ordinary observation and experience in the trial of criminal cases do not lead to the conclusion that such nice distinctions ever enter into the deliberations of the jury or secure a verdict. Human life in this state has not become so cheap that it can be taken and the party so taking it obtain immunity on the plea of self-defense, where the facts and circumstances surrounding the killing do not show that the killing was done in an honest belief either of imminent danger to the life of the party taking it or of great bodily harm to his person. The conjunctive use of the words "honestly believes" and "had reason to believe," in a criminal case, has been held proper by this court. *State v. Stockhammer*, 34 Wash. 262, 75 Pac. 810; *State v. Cushing*, 17 Wash. 544, 560, 50 Pac. 512.

Fourth. There was no error in the use of the words "great bodily harm." *State v. Johnson*, 47 Wash. 227, 230, 91 Pac. 949. The contention of the appellant that one who is in apparent danger of "bodily harm" can take the life of his assailant, would give encouragement to the taking of human life upon the merest pretext of danger. We are not willing to recognize or announce a doctrine so fraught with danger to both the public peace and the safety of the citizen.

(10) It is urged that the use of the word "felonious" in instruction 6 was error. *State v. Clark*, 134 N. C. 698, 47 S. E. 36, is relied upon in support of this assignment. In that case the court, in effect, told the jury that they should convict the defendant if they were left in doubt as to whether the deceased at the time of the killing was making a felonious assault upon the defendant. This would place the burden of proof on the defendant, when the law at every stage of the trial casts it upon the state. The court also criticised the trial court for failing to define the word "felo-

nious." It is urged that it should have been defined to the jury in this case. The appellant, not having requested the court to define it, cannot predicate error upon the mere failure to do so. *State v. Johnson*, 19 Wash. 410, 58 Pac. 667. Moreover, the instructions taken as an entirety clearly indicated to the jury the meaning of this word.

(11) (12) These assignments have reference to the words "great bodily harm" and "honestly believes," and have already received consideration. The appellant in his requested instructions used these words in substantially the same manner as they were used by the court. We should, therefore, have been justified in treating the words as having been used at his request, but have preferred to rest our view on the ground that their use was proper.

(13) It is here urged that the court's instruction No. 15 was erroneous, as not including the defendant's knowledge derived from personal observation. When the court instructed the jury that it should consider "all the facts and circumstances bearing on the question and surrounding defendant and existing at or prior to the firing of the alleged shot," it fully covered the ground upon which the assignment is made. "All the facts and circumstances" certainly include each and every one of them.

(14) This assignment has been considered in discussing the objection to the words "great bodily harm."

(15) In order to sustain this assignment we would be required to hold that a simple assault or an ordinary battery would justify the taking of human life. We are not willing to stand sponsor for such a doctrine.

(16) The repetition of certain instructions is assigned as error. The jury during its deliberations returned into court and submitted the following communication:

"Your Honor, The jury would like to have repeated that part of the instruction referring to defendant's state of mind as a reasonable man at the time of the shooting. Our interpretation or understanding at this point differ."

Mar. 1909]

Opinion Per GOSE, J.

Whereupon the court again read to them instructions 19, 20, and 21. Thereupon the appellant requested the court to again read to the jury instruction 6. The court thereupon again read to the jury all the instructions in the case. This did not constitute error.

(17) Error is predicated upon the refusal of the court to give to the jury appellant's requested instruction No. 18, which is as follows:

"I instruct you, that upon the issue of self defense involved in this case, the real question presented to you is: Did the facts as they appeared to the defendant at the time of the alleged shooting coupled with any threats of death or violence which deceased may have made against the defendant, if you believe from the evidence he made any, and his general reputation as a quarrelsome and dangerous man; if you believe the same has been established by the evidence; justify an ordinarily prudent man in believing he was in imminent danger of death or serious bodily harm or injury. If you believe from the evidence that such were the appearances to defendant, he was excused for the commission of the killing, if any has been proven, as the rights of self defense permit one to act honestly upon the appearances of danger, to which he is exposed at the time."

In legal meaning and effect it did not differ from the instructions given.

The record is singularly free from error, and the instructions to the jury were clear, apt, and comprehensive. The case will therefore be affirmed.

CHADWICK, FULLERTON, CROW, MOUNT, and DUNBAR,
JJ., concur.

[No. 7477. Decided March 19, 1909.]

MANHATTAN BUILDING COMPANY, *Appellant*, v. THE CITY
OF SEATTLE, *Respondent*.¹

EMINENT DOMAIN—PLEADINGS—ABUTTING OWNERS—CROSS-COMPLAINT. The act, Laws of 1905, p. 84, does not require, in proceedings to condemn property for a regrade of city streets, any answer from the original parties to the suit, and a cross-complaint filed by such a party is properly struck out.

SAME—TRIAL—JURY TRIAL—REVIEW—DISCRETION. Laws 1905, p. 87, § 7, providing for separate juries to determine the damages in condemnation proceedings by a city for street purposes, if demanded, "and the court shall deem it proper," leaves it discretionary to grant separate trials, and the action of the court will be reviewed only for an abuse of discretion.

SAME—ABUSE OF DISCRETION. It is not an abuse of discretion to refuse a demand for a separate jury in such a case, asked on the ground that the jurors had, after numerous other trials, formed an opinion which it would take evidence to remove, where prejudice does not appear from the verdict returned, and the trial court had abundant opportunity to test the fairness of the jury.

SAME—JURY—CHALLENGE—JOINING IN CHALLENGE. Under Bal. Code, § 4979, providing that defendants representing different interests shall join in their peremptory challenges to jurors, an abutting owner having a separate trial in condemnation proceedings is not entitled to exercise separate challenges.

SAME—EXAMINATION OF JURY. Where a jury in condemnation proceedings is empanelled to try the whole issue of compensation to different defendants, an abutter, upon entering upon a separate trial, is not entitled to again examine a juror as to his qualifications by reason of matters occurring since the jury was empanelled, even where the party offered to show that the juror had formed opinions which it would take evidence to remove, there being no offer to show disqualifications by extrinsic evidence.

APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS. Error in commenting on the evidence is waived if not excepted to.

TRIAL—MISCONDUCT OF JUDGE—COMMENTS ON EVIDENCE. Comment on rejected evidence is not unlawful comment on the evidence.

EVIDENCE—EXPERTS—QUALIFICATIONS. In condemnation proceedings of a leasehold interest for a regrade of streets, a witness is qualified as an expert where he says he is familiar with the effect

¹Reported in 100 Pac. 330.

Mar. 1909]

Opinion Per FULLERTON, J.

of the improvement on rental values, although he at first stated he was not familiar with its effect on the market value of leasehold interests.

APPEAL—HARMLESS ERROR—EMINENT DOMAIN—PROCEEDINGS—EVIDENCE. Upon condemnation of leasehold interests for a regrade of streets, it is not reversible error to allow a witness to answer the question "and you did not include the filling in of the back yard simply to have something to do."

SAME. In such a case it is not error to refuse to allow a witness to state whether appellants' tenants were of such a class as would be obliged to stay during the regrade, where it had been shown that it would be impossible to keep more than half the tenants.

TRIAL—WITNESSES—LIMITING NUMBER—PARTIES—CORPORATIONS—STOCKHOLDERS. A stockholder of a defendant corporation comes within a restriction limiting the number of witnesses upon an issue, and cannot be used as a witness after the limit is reached on the theory that he is a party.

EMINENT DOMAIN—DAMAGES—CHANGE OF GRADE—EVIDENCE—PLANS—ADMISSIBILITY. Upon an issue as to the cost of readjusting buildings to conform to a change of grade, a sketch of plans of a proposed change is not inadmissible because not made with reference to the latest building ordinances of the city, where it does not appear that anything new is required thereby.

APPEAL—REVIEW—INSTRUCTIONS. Error in isolated instructions is not ground for reversal, if the instructions are correct when considered as a whole.

APPEAL—REVIEW—VERDICT—INADEQUACY—NEW TRIAL. The supreme court cannot disturb a verdict for damages to property and grant a new trial on the ground of the inadequacy of the verdict, where there was substantial evidence sustaining it, although the trial court might have done so.

Appeal by an abutting owner from a judgment of the superior court for King county, Griffin, J., entered January 20, 1908, upon the verdict of a jury, awarding damages to its property by reason of a change of grade of a city street, after a trial on the merits in condemnation proceedings. **Affirmed.**

Douglas, Lane & Douglas, for appellant.

Scott Calhoun and *King Dykeman*, for respondent.

FULLERTON, J.—The city of Seattle by ordinance changed the established grades on certain of its streets, and directed

that the streets be reconstructed and regraded so as to make them conform to the new grades so established. The required grades changed the surface contour of the streets, necessitating cuts and fills, and the consequent taking and damaging of the private property abutting thereon. This action was begun for the purpose of condemning the property required to be taken and damaged, and to determine the just compensation to be paid therefor.

Among the parties made defendant to the proceedings, was the appellant, Manhattan Building Company, which held a lease on a certain block bounded by streets directed to be regraded, which lease at the time of the trial had fourteen years and nine months to run. On this block it had constructed buildings of the estimated value of \$200,000, containing storerooms and housekeeping apartments. After the service of summons upon it, the appellant gave notice of its appearance, and subsequently filed a cross-petition, in which it set out its interest in the property and a statement of the injury it would suffer by the change of the grade of the streets as proposed to be made. This cross-petition was stricken by the court, on motion of the city. Thereafter and without any further pleading on the part of the appellant, a trial was had before a jury to ascertain the amount of compensation to which the appellant was justly entitled, which trial resulted in a verdict in its favor of \$23,500. From a judgment entered on the verdict, this appeal is taken.

It is assigned, first, that the court committed reversible error in striking the appellant's cross-petition. This contention is founded upon the provisions of the eighth section of the act under which the city proceeded (Laws 1905, p. 84 *et seq.*) and the decision of this court in the case of *Seattle v. Park*, 42 Wash. 151, 84 Pac. 644. In the case cited the court quoted from the section referred to and said that the language used therein did authorize the filing of a cross-petition, and that it was error on the part of the trial court to strike the same; but it held the error harmless in the par-

Mar. 1909]

Opinion Per FULLERTON, J.

ticular case owing to the disposition the court subsequently made of it. By reference to the section cited, it will be observed that it is only a person who owns an interest in the property sought to be taken or damaged who was not made a party to the original proceedings and who comes into the proceedings for the purpose of having the value of his interests determined, that is required "to file the statement of his interest in and to a description of the lot, parcel of land, or other property, in respect to which he claims compensation." A party named in the original petition is neither required nor expected to file pleadings of any kind, and whether he shall be permitted so to do rests in the sound discretion of the trial court. In the opinion cited, it is not made clear whether the defendants who attempted to file a cross-petition were parties named in the original petition or not; but, regardless of this fact, we are clear that a correct construction of the statute makes the right depend on the condition pointed out. It was not error in this instance to strike the cross-petition.

The appellant was named defendant in the proceedings with some two hundred others. Prior to the impanelling of the jury it filed in writing with the court a demand for a separate jury, this demand was refused, and it thereupon participated in the selection of the jury with other defendants. In selecting the jury it objected to being required to join with the other defendants in exercising peremptory challenges, and demanded the right to challenge separately. This demand was also refused. The court tried the claims of the different defendants separately, and when the question of the amount to be allowed the appellant came on for hearing—it being the one hundred and forty-fourth of such questions tried by the same jury—the appellant moved the court to be again allowed to question the several jurymen whether or not either of them had a fixed opinion as to the benefits or damages that would accrue to the appellant's property by reason of the change of grade. This motion being denied, it

offered to show by an examination of the several jurymen that certain of them did have fixed opinions as to such benefits and damages, and that the opinions were such as would require evidence to remove. This offer to prove was refused; when it again demanded a separate jury, which demand the court again denied. These several rulings were each excepted to, and constitute the second, third, fourth and fifth assignments of error.

The seventh section of the act under which the court proceeded reads as follows:

"Upon the return of said summons, or as soon thereafter as the business of court will permit, the said court shall proceed to the hearing of such petition and shall impanel a jury to ascertain the just compensation to be paid to all of such owners and occupants aforesaid; but if any defendant or party in interest shall demand, and the court shall deem it proper, separate juries may be impaneled as to the compensation or damages to be paid to any one or more of such defendants or parties in interest." Laws 1905, p. 87.

It is plain that under this section of the statute the question whether the court will grant to any single defendant a separate jury is one within its discretion, and being so, its order will be reversed only when it is manifest that the discretion has been abused. The appellant, realizing this, contends that this discretion was abused, but we find nothing in the record which supports the contention. The evidence would have sustained a much larger verdict, it is true, but since the trial court who heard the evidence as well as the jury, felt that the verdict was not disproportionate to the probable injury the change in the streets would inflict, we cannot find prejudice on the part of the jury from this fact alone. Moreover, the trial court had abundant opportunity in the trial of the preceding cases to test the fairness of the jury, and certainly he would not have allowed them to sit in any case, whether complaint was made or not, had he thought

Mar. 1909]

Opinion Per FULLERTON, J.

that the verdicts returned by them did not accord with the evidence on which they were founded.

The assignment based upon the fact that the defendants were required to join in their peremptory challenges is not well founded. The section of the statute providing for peremptory challenges (Bal. Code, § 4979; P. C. § 593), provides that when there are several parties on either side, they shall join in a challenge before it can be made. Construing this section we have held that defendants representing conflicting interests and appearing separately must join in a challenge before it can be allowed. *Colfax Nat. Bank v. Davis*, 50 Wash. 92, 96 Pac. 823. Nor was there error in refusing to permit the appellant to re-examine the jury touching their qualifications to act as jurors when the question of the amount of damages to be awarded it was brought on for hearing. Under the statute the jurors are impaneled to try out the entire issue, and they do not become disqualified on one issue merely because they may have heard another. The contention is not aided by the offer of proof made. Had the appellant offered to show by extrinsic evidence that the jury or certain of the persons composing it had disqualified themselves, a different question would have been presented, but it was not improper to deny the right to inquire of the individual jurymen as to their then state of mind.

The sixth assignment of error is that the court commented on the evidence. To us it seems a sufficient answer to this assignment to say that the words of the court thought to constitute a comment were not excepted to on that ground. This error like most others can be waived, and is waived if not called to the attention of the court in such a manner as to give him an opportunity to correct it. For this reason, therefore, the objection must be held not well taken. But the comment of the court was not in fact a comment on the evidence; it was made concerning proffered evidence that was not permitted to go to the jury. In rejecting evidence the judge may speak of its materiality and evidentiary value

without subjecting himself to the charge of commenting on the evidence.

The respondent called as a witness one O. Pardee, and questioned him concerning the effect that the proposed changes would have, when made, on the rental values of the appellant's property. After he had concluded his testimony, the appellant moved to strike it on the ground that he had not shown himself qualified to testify on the question. Touching his qualifications, the following appears in the record:

"Q. Are you familiar with the effect of regrading and improving the streets upon the market value of leasehold interests? A. I cannot say that I am—that I have come personally in contact with a leasehold interest, or the sale of any leasehold interest. Q. Well, are you familiar with the effect of an improvement like the proposed improvement on rental values? A. Yes."

It is thought that he is disqualified by reason of the first answer above quoted. But the witness qualified himself by the second answer. While the ultimate question may be the difference in the market value of the leasehold interest before and after the improvements are made, the increase or loss in rental values is one of the elements proper to be inquired into in ascertaining that difference. The witness showed himself qualified to testify on this question and the court did not err in refusing to strike his testimony.

The rulings made with reference to the admission and exclusion of evidence are not fatal. It was not reversible error to refuse to sustain the appellant's objection to the question, "And you did not include the filling in of the back yard simply to have something to do?" The question may not have had much pertinence to the inquiry in hand, yet to permit the witness to attempt to answer it cannot have been prejudicial. Nor was it reversible error to refuse to permit the appellant's witness Bruskevith to answer whether the appellant's tenants were of such a class as would be obliged to stay in the buildings and endure the annoyance and

Mar. 1909]

Opinion Per FULLERTON, J.

inconveniences that would be caused them by raising the house and regrading the streets, as this could bear but remotely on the real question at issue. Moreover, the witness was permitted to testify that it would be impossible to keep the houses more than half full of people during the time the improvements were being made, and that the loss of as much as a whole year's rental would result therefrom.

The court limited each side to a given number of witnesses on the question of damages. After the appellant had exhausted its quota, it put one of its stockholders on the stand and sought to have him testify on the same question. The court refused to permit him to so testify, and the refusal is assigned as error. It is said an owner may testify concerning his losses by a given act regardless of rules limiting the number of witnesses. But if this be true as applied to persons who own the damaged property by a direct title in themselves, it would have no application to a stockholder in a corporation. An owner of property is presumed to know the nature of the property he holds and to be able to testify concerning it from his own knowledge, but the presumption does not apply to a mere stockholder in a corporation. If, therefore, it were error to reject such evidence in the case considered, which we do not decide, it would not be error in the particular case.

The respondent's witness Allen testified concerning the costs of readjusting the appellant's buildings so as to make them conform to the change of grade. He also submitted a sketch of his proposed plans which was admitted in evidence. On cross-examination he admitted that his plan and estimates were not made with reference to the latest building ordinance of the city, and the appellant moved to strike his testimony for that reason. This motion was properly denied, as it had not then been made to appear that the new building ordinance required anything more to be done than the plans submitted contemplated.

Errors eleven, twelve, thirteen and fifteen, relate to the

instructions given, and refused by the court. These do not require discussion in detail. Certain portions of the instructions when isolated from their context, or from the instructions as a whole, could hardly be justified as correct statements of the law applicable to the question at issue; but when they are considered with what precedes and follows them, we think the jury was not misled. The court's instructions are to be considered as a whole, and if, when so construed, they correctly state the law, it is not ground for reversal that parts of the charge standing alone may state the rule incorrectly.

It is particularly insisted, however, that the court erred in refusing to give a requested instruction to the effect that in "arriving at the cost of any readjustment that you will find necessary to the buildings and other improvements . . . you cannot consider any plans or other methods of readjustment which are contrary to the building ordinances of the city." But we find that this charge was given in substance. Certain of the appellant's witnesses testified that the necessity of raising the buildings would require additional fire walls in the foundations of the buildings not shown on the plans introduced by the city, but which were required by the city's latest building ordinance. The court charged the jury that in estimating the cost of these foundations they should consider only "such as will comply with the ordinances of the city of Seattle." This instruction was sufficient to call the attention of the jury to the specific question.

The last assignment to be noticed is the inadequacy of the verdict. While error in the assessment of the amount of recovery, whether too large or too small, when the action is for injury to property, is made a ground for new trial by the code, a new trial must be granted by the trial court for that reason if it is granted at all. The appellate court is authorized to interfere with the verdict of a jury only when there is no substantial evidence sustaining it, and it could be only in an extreme case where the court could rightfully in-

Mar. 1909]

Syllabus.

terfere on the ground that the verdict was too small. No such case is presented by this record. Here there is substantial evidence sustaining the findings of the jury. The distinction between the powers of the two courts in this respect are pointed out in the opinion in the case of *Clark v. Great Northern R. Co.*, 37 Wash. 537, 79 Pac. 1108, and the cases there collected.

There is no substantial error in the record and the cause will stand affirmed.

RUDKIN, C. J., CROW, DUNBAR, and MOUNT, JJ., concur.

CHADWICK and GOSE, JJ., took no part.

[No. 7791. Decided March 22, 1909.]

R. V. ANKENY, *Respondent*, v. YOUNG BROS., *Appellant*.¹

BROKERS—AUTHORITY—PRINCIPAL AND AGENT—SALES—BROKER AS AGENT OF PURCHASER—EVIDENCE—SUFFICIENCY. A coffee broker, B., at San Francisco, is constituted defendant's agent to buy two certain lots of coffee from two coffee merchants, where it appears that defendant made an offer for coffee to L., a broker at Seattle, agent of B., which B. declined; that B. wired L. that he could buy, if unsold and accepted by telegraph, two certain lots at a certain price, which offer was communicated to defendant and accepted by wire from L. to B.; that B. relied on such acceptance, and purchased the lots from the merchants, who shipped direct to defendant, making delivery ex-warehouse according to the custom of traders, notifying defendant, who corresponded with the merchants with reference to the purchase.

SALES—DELIVERY AND ACCEPTANCE—DELIVERY EX-WAREHOUSE—CUSTOM OF TRADERS. There is a delivery and acceptance of coffee sold, where a broker was constituted the purchaser's agent to buy the coffee, and purchased the same to be shipped by steamer, and the custom was to make the delivery at the warehouse at the point of shipment, which was done, and proper warehouse orders were delivered to the broker, who caused the coffee to be loaded aboard ship; the purchaser being bound to take notice of the custom, and the delivery to the broker being delivery to him.

¹Reported in 100 Pac. 736.

SALES—DELIVERY—LOSS OF GOODS IN TRANSIT. After delivery and acceptance of goods sold, at the point of shipment, the vendee must suffer the loss of goods in transit.

FRAUDS, STATUTE OF—SALE OF GOODS—MEMORANDUM—SIGNATURE OF BROKER. A broker's signed contract to buy coffee showing the names of the seller and buyer, date, quality, amount, price and terms of sale, entered in his sale book, constitute a sufficient memorandum of the sale to satisfy the requirements of the statute of frauds.

SALES—BROKERS—PRINCIPAL AND AGENT—RATIFICATION OF PURCHASE BY BROKER. The purchaser of coffee ratifies a purchase made for him by a broker, where, upon being fully informed, he fails to express dissatisfaction, but on the contrary acknowledges receipt of the invoice and corresponds with the vendor respecting non-arrival of the shipment on time.

SALES—BY SAMPLE—QUESTION FOR JURY. A sale of coffee is not made by sample, as a matter of law, although samples were exhibited, where it appears that the sale was of two particular identified lots, delivered to the purchaser's agent and by him put aboard ship; it being a mixed question of law and fact for the jury.

Appeal from an order of the superior court for King county, Albertson, J., entered July 16, 1908, granting a new trial for error of law, after a nonsuit, upon a trial before the court and a jury, in an action for goods sold and delivered. Affirmed.

McClure & McClure and Ira Bronson, for appellant, contended, *inter alia*, that there was no knowledge on the part of the principal concerning the circumstances of the transaction sufficient to admit of a ratification of the unauthorized acts of the agent Bickford. *Murphy v. Clarkson*, 25 Wash. 585, 66 Pac. 51; *O'Shea v. Rice*, 49 Neb. 893, 69 N. W. 308; *Haynes v. Tacoma, Olympia & G. H. R. Co.*, 7 Wash. 211, 34 Pac. 922; *Armstrong v. Oakley*, 23 Wash. 122, 62 Pac. 499; *Norman v. Western Union Telegraph Co.*, 31 Wash. 577, 72 Pac. 474. Bickford, if acting as broker, was incompetent to represent both parties in the transaction without their full knowledge and consent. 1 Mechem, Sales, § 463; Mechem, Agency, § 943; *Farnsworth v. Hemmer*, 1 Allen 494, 79 Am. Dec. 756; *Meyer v. Hanchett*, 39 Wis.

Mar. 1909]

Citations of Counsel.

419, 43 Wis. 246; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528; *Raisin v. Clark*, 41 Md. 158, 20 Am. Rep. 66; *Everhart v. Searle*, 71 Pa. St. 256; *Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 541; 19 Cyc. 207, and note 80. Delivery to the purchaser ex-warehouse at the port of San Francisco, being a local custom, as shown by the evidence, would have no binding effect on the defendant in the absence of proof showing notice thereof. 12 Cyc. 1046; *Simon v. Johnson*, 101 Ala. 368, 13 South. 491; *German-American Ins. Co. v. Commercial Fire Ins. Co.*, 95 Ala. 469, 11 South. 117, 16 L. R. A. 291; *Mathias Planing Mill Co. v. Hazen & Co.*, 20 Ohio Cir. Ct. 287, 11 Ohio Cir. Dec. 54. Mere delivery without a part acceptance of the goods is insufficient to take the case out of the statute of frauds. 29 Am. & Eng. Ency. Law (2d ed.), 988, 989; 20 Cyc. 249; Bal. Code, § 4577; 1 Mechem, Sales, §§ 357, 365; *Denmead v. Glass*, 30 Ga. 637; *Keiwert v. Meyer*, 62 Ind. 587, 30 Am. Rep. 206; *Lloyd & Pullman v. Wright, Griffith & Co.*, 25 Ga. 215; *Maxwell v. Brown*, 39 Me. 98, 63 Am. Dec. 605; *Shindler v. Houston*, 1 N. Y. 261, 49 Am. Dec. 316; *Brunswick Grocery Co. v. Lamar*, 116 Ga. 1, 42 S. E. 366; *Gatiss v. Cyr*, 134 Mich. 233, 96 N. W. 26; *Hausman v. Nye*, 62 Ind. 485, 30 Am. Rep. 199; *Atherton v. Newhall*, 123 Mass. 141, 25 Am. Rep. 47; *Winner v. Williams*, 62 Mich. 363, 28 N. W. 904; *Simmons Hardware Co. v. Mullen*, 33 Minn. 195, 22 N. W. 294; *Norman v. Phillips*, 14 M. & W. 277; *Hanson v. Armitage*, 5 Barn. & Ald. 557; *Johnson v. Cuttle*, 105 Mass. 447, 7 Am. Rep. 545; *Pierson v. Crooks*, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. 831; *Allard v. Greasert*, 61 N. Y. 1; *Stone v. Browning*, 68 N. Y. 598; *Bullock & Co. v. Tschergi*, 13 Fed. 345.

Harold Preston and Todd, Wilson & Thorgrimson, for respondent, contended, among other things, that the purchase of the coffee by Lincoln through Bickford involved no element of discretion or personal skill, but was an act purely

mechanical, and power to delegate the performance of it was implied by law. 1 Am. & Eng. Ency. Law (2d ed.), pp. 979, 980; 4 Am. & Eng. Ency. Law (2d ed.), p. 967; Mechem, Agency, §§ 193, 194; *Sims v. May*, 1 N. Y. Supp. 671; *Eastland v. Maney*, 36 Tex. Civ. App. 147, 81 S. W. 574; *Rosenstock v. Tormey*, 32 Md. 169, 3 Am. Rep. 125. Young Bros., if they did not intend to be bound by Bickford's acts, should have promptly disavowed and repudiated the transactions. 1 Am. & Eng. Ency. Law (2d ed.), pp. 1195, 1203, 1206, and note; Huffcut, Agency, p. 34; Mechem, Agency, pp. 101, 102; *Clews v. Jamieson*, 182 U. S. 461, 21 Sup. Ct. 845, 45 L. Ed. 1183; *Foster v. Rockwell*, 104 Mass. 167. Castle Bros. and Bloom Bros., standing in the position of undisclosed principals, have the right to enforce the contract entered into by the agent, Bickford, in his name, but for their benefit. Huffcut, Agency, § 122; 1 Am. & Eng. Ency. Law (2d ed.), 1168; *Sullivan v. Shailor*, 70 Conn. 733, 40 Atl. 1054; *Havana etc. R. Co. v. Walsh*, 85 Ill. 58; *Barry v. Page*, 76 Mas. 398; *Darrow v. Horne Produce Co.*, 57 Fed. 463; *Ford v. Williams*, 62 U. S. 287, 16 L. Ed. 36. The book entries of Bickford, as broker, were sufficient to comply with the statute of frauds and constituted the contracts between the parties. Tiedeman, Sales, § 76, pp. 100, 442; Benjamin, Sales, §§ 273, 294, 295; 4 Am. & Eng. Ency. Law (2d ed.), 751, 966; *Coddington v. Goddard*, 16 Gray 443. If Bickford had any authority whatever to negotiate the purchase, it will be presumed, in the absence of evidence to the contrary, that he was authorized to transact the business in accordance with the customs and usages prevailing in San Francisco, even though Young Bros. did not know what they were. 19 Cyc. 199; Tiedeman, Sales, p. 440; 4 Am. & Eng. Ency. Law (2d ed.), p. 962; 29 Id. 394.

GOSE, J.—The complaint alleges, that about the 27th day of September, 1905, the defendant purchased from Castle Bros., in the city of San Francisco, and said Castle

Mar. 1909]

Opinion Per Gose, J.

Bros. then and there sold and delivered to the defendant, sixty-five bags of Guatemalan coffee, at the agreed price of \$1,072.46; that Castle Bros. expended for carting the coffee the sum of \$3, which the defendant agreed to pay, and that no part of the same has been paid. For a second cause of action it is alleged, that on or about the same date the defendant purchased from Bloom Bros., in the city of San Francisco, and the said Bloom Bros. then and there sold and delivered to defendant, fifty-nine bags of Hawaiian coffee, at the agreed price of \$1,006.07, and that no part of the same has been paid. It is further alleged that, on or about the 4th day of November, 1905, each of said accounts was sold and assigned to Isidor Kohn, the original plaintiff in the action.

The answer, by suitable denials, joined issue on each of the causes of action. The defendant pleaded affirmatively certain facts tending to show that each of said alleged sales was within the statute of frauds. The reply joined issue upon the affirmative matter pleaded in the answer. Before the commencement of the trial, upon the stipulation of the parties, the respondent was substituted as the plaintiff. Upon the issues thus joined the case proceeded to trial to a jury. At the conclusion of the plaintiff's testimony and upon the motion of the defendant, a nonsuit was granted. Thereafter the court, upon the application of the plaintiff, granted a new trial. The defendant has appealed from such order.

The testimony tended to show, that one Lincoln was a coffee broker in Seattle at the time of the alleged sale; that at such time he was agent for one Bickford, who was, and for many years had been, a coffee broker in the city of San Francisco; that the appellant entered into negotiations with Lincoln with a view to purchasing coffee; that thereafter telegrams passed between Lincoln and Bickford relative to a sale to the appellant of two certain kinds of coffee; that on September 26, Lincoln wired Bickford at San Francisco, in substance, that the appellant offered eleven cents for the

entire lot of these two kinds of coffee, viz., Nos. 24 and 33; that on the 27th Bickford answered by wire declining the appellant's offer, and stating: "We can buy if unsold, and you telegraph acceptance immediately No. 24, 11¼ c., No. 33, 11½ c., all lowest quotation;" that Lincoln upon the receipt of this telegram (we quote from his testimony), "advised Young Bros. [the appellant] without a doubt of the contents of the telegram;" that the appellant accepted Bickford's offer; that Lincoln on September 27 sent Bickford a cipher dispatch, which translated reads: "Young Bros. accept all No. 24, 11¼ c., No. 33, 11½ c., cash, less 2 per cent. Ship per Santa Barbara;" that on September 27, Bickford, relying upon the authority contained in such telegram, purchased of Castle Bros. sixty-five bags of No. 24, and from Bloom Bros. fifty-nine bags of No. 33, and wired Lincoln: "We have bought Young No. 24, 65 bags 11¼; No. 33, 59 bags 11½;" that on September 28, Lincoln advised the appellant in writing of this purchase, and advised him further that he had ordered the coffee shipped on the steamer Santa Barbara, due to sail from San Francisco on the 30th inst.

On September 30, Castle Bros., by letter, advised the appellant of the sale, in which they stated: "Inclosed we beg to hand you invoice covering your esteemed order for coffee, which we shipped by Mr. Bickford, and who will no doubt forward you shipping receipt;" that the invoice inclosed with such letter stated that Castle Bros. had sold to appellant sixty-five bags Guatemala, at 11¼; that on October 3, the appellant wrote a letter to Castle Bros., in which it stated: "With regard to your invoice of September 29, we notice a charge of \$3 for drayage. We have received a separate account from James Forrest and are returning their account and referring them to you for to share in the bill."

It further appeared, that on October 17, the appellant wired Castle Bros., stating that the coffee had not arrived; that on October 16, Castle Bros. wired to the appellant, stat-

Mar. 1909]

Opinion Per GOSSE, J.

ing that they had not received payment for the coffee, and that they had drawn for the amount; that on November 2, the appellant wrote to Bickford, stating that it understood that the Santa Barbara had met with an accident and that the coffee had been damaged; that it had declared on the loss October 11; that it was as yet unadvised as to the extent of the damage, and "also many other particulars regarding the shipment except that the original sellers are anxious for their pay;" "that it will be necessary to have you [Bickford] forward us a copy of the master's protest in order that we may make a claim for the damages;" that Bloom Bros. mailed their account for fifty-nine bags Hawaiian coffee to the appellant; that the account is dated September 29; that on October 17, they drew upon the appellant a sight draft for the amount of the account; that no payments have been made on either of such accounts; that the coffee did not reach Seattle; that on September 28, Bickford executed broker's contracts in triplicate for each of such sales, and forwarded one to Castle Bros., one to Bloom Bros., and one on each of said sales to either Lincoln or appellant; that he is not certain as to which of these parties he mailed the contract to; that such contracts showed the name of the party selling, the name of the purchaser, the date, quality, amount, price, and terms of the sale; that they were signed by Bickford; that he entered such contract on his sales book; that on September 29, Castle Bros. gave to Bickford for the appellant an order on the warehouse for the sixty-five bags of coffee No. 24, and on the same day Bloom Bros. gave him a like order for the fifty-nine bags of coffee No. 33; that on September 30, Bickford caused the same to be loaded on the steamship Santa Barbara.

A number of questions have been presented by both the appellant and the respondent, but, as we view the case, it falls within a narrow compass. There is some conflict in the evidence as to the correct translation of the telegram from

Lincoln to Bickford in which he directed the latter to buy the coffee. There is, however, no material difference in the testimony as to the correct translation as applied to the view we take of the case. As we have shown, Mr. Lincoln testified that, after receiving Bickford's telegram stating that he could buy the coffee if unsold, he "advised Young Bros. without a doubt of the contents of the telegram;" and again he said: "Well, Young Bros. accepted Mr. Bickford's offer." It is true, as the appellant urges, that Lincoln softened this testimony somewhat on his cross-examination. We gather from Bickford's testimony that the appellant knew that neither he nor Lincoln owned the coffee, and that he knew that they both were brokers. We have shown that it is in evidence, that, when Lincoln notified the appellant that Bickford had wired him the terms upon which he could buy the coffee, the appellant accepted Bickford's offer, and that Lincoln wired Bickford to that effect, and that Bickford thereupon made the purchase. It is urged that the evidence does not establish the fact that the warehouse orders and the shipping receipts covered the coffee sold. There was sufficient evidence as to its identity to be submitted to the jury.

The evidence further tends to show that there was a custom among traders to the effect that, in such transactions, delivery was made ex-warehouse. The appellant urges that the evidence confines this custom to San Francisco. We do not understand that it is so limited. We think the telegrams which passed between Bickford and Lincoln, as explained by the latter upon the witness stand, were in effect a direction from the appellant to Bickford to go into the market and buy the particular coffee for it at the price stated. The evidence is not susceptible of any other reasonable interpretation. Upon receipt of the telegram, "Young Bros. accepts," etc., Bickford became the agent of the appellant, empowered to buy the coffee for it, and he did so. An agency may be created by written or spoken words or by the conduct of the parties. This is fundamental. We have pointed out that,

Mar. 1909]

Opinion Per GOSSE, J.

on October 3, the appellant wrote to Castle Bros., acknowledging the receipt of the invoice of the sixty-five bags of Guatemalan coffee. Not only do the telegrams as explained by Lincoln tend strongly to establish such agency, but the subsequent conduct of the appellant in its letters to Castle Bros. and to Bickford, strengthens the view that the appellant intended to establish such relation.

We next inquire whether there was a delivery and acceptance of the coffee. The evidence, as we have said, tends to prove that there was a custom among traders to the effect that the delivery in such transactions was at the warehouse at the point of shipment. Proper warehouse orders for the coffee were delivered to Bickford, and he received it and caused it to be loaded aboard ship as directed. We have observed that the evidence does not show that the custom was local to San Francisco. The appellant was therefore obliged to take notice of such custom. However, Bickford being a San Francisco broker, a delivery to him according to the customary usage of the trade at that point would be binding on the appellant.

"In the absence of a special contract, the authority and duty of a broker depends upon the course of dealing in the particular community. A customer in giving authority to a broker to negotiate a transaction in a certain market is presumed, in the absence of evidence to the contrary, to have authorized the broker to transact the business in question in accordance with the rules, customs, and usages prevailing in that exchange." 19 Cyc. 199.

See, also, 4 Am. & Eng. Ency. Law (2d ed.), 962; Tiedeman, Sales, par. 272. There was, therefore, an ample *prima facie* showing of the delivery and acceptance of the coffee. Moreover, the broker's contract which Bickford executed, and his book entries, satisfied the requirements of the statute of frauds. Tiedeman, Sales, par. 76.

"There is a class of persons who make it their business to act as agents for others in the purchase and sale of goods, known to the common law as brokers. These persons, as a

general rule, are agents for both parties, and their signature to the memorandum or note of the agreement is binding on both principals, if the memorandum be otherwise sufficient under the statute." Benjamin, Sales, § 273.

"The bought and sold notes, according to the weight of authority, are only copies of the original contract, the entry upon the broker's book being the original and binding contract between the parties, which is not affected by a mistake in making out the notes." 4 Am. & Eng. Ency. Law (2d ed.), p. 751.

"The broker's signed entry in his book constitutes the contract between the parties, and is binding on both. . . . The bought and sold notes do not constitute the contract." Benjamin, Sales (7th ed.), §§ 294, 295.

See, also, *Coddington v. Goddard*, 16 Gray 443; 4 Am. & Eng. Ency. Law (2d ed.), p. 966; Tiedeman, Sales, pp. 100, 442.

There was evidence tending to show that the appellant, with knowledge that Bickford had purchased the coffee at the price theretofore directed by it, from whom he had purchased it, and with knowledge of all the terms and conditions of the contract, by his letters and conduct, ratified the purchase. It cannot, therefore, defeat a recovery because the goods were lost in transit.

"The rule as to what amounts to ratification of an unauthorized act is elementary and may be safely stated thus: Where a person assumes in good faith to act as agent for another in any given transaction, but acts without authority, whether the relation of principal and agent does or does not exist between them, the person in whose behalf the act was done, upon being fully informed thereof, must within a reasonable time disaffirm such act, at least in cases where his silence might operate to the prejudice of innocent parties, or he will be held to have ratified such unauthorized act." Mechem, Agency, § 157.

In *Foster v. Rockwell*, 104 Mass. 167, it is said:

"There is another view of the case which is equally decisive in favor of the plaintiffs. On the 21st of October a letter was mailed by these agents to the defendant, giving him

Mar. 1909]

Opinion Per Gose, J.

definite information of the purchase and shipment, with all the particulars of the transaction. No reply was made to this letter, and the first expression of disapprobation on his part is contained in a letter to the agents dated the 29th of October, in reply to one of the 26th, containing a suggestion that the property had been lost in Long Island Sound. We think there is sufficient evidence, in this conduct of the defendant, that he intended the original authority to cover the act, or that he then ratified and affirmed it. The duty of the principal at once to disaffirm an act done by another in his name, or on his account, when brought to his knowledge, is more imperative when the unauthorized act is the act of an agent, done in the execution of a power conferred, in a mode not sanctioned by its terms. Implied ratification from mere silence more readily arises when the act is in misuse or excess of authority given. In such cases, the principal has no right to delay, if he intends in any contingency to repudiate the act of his agent. He cannot lie by, and seize the benefit of it if profitable, or renounce it if otherwise, at his election. The defendant's silence on the receipt of the letter in this case cannot be accounted for on any other theory than that of his approval of the purchase. . . . If the transaction, when brought to his knowledge, was not seasonably disapproved, it is enough, and a ratification must be presumed, with all the consequences which follow, one of which is that the property vested in him, before its loss, by delivery to the carrier."

It is fundamental that the subsequent ratification of an unauthorized act when the facts are known is equivalent to a previous authorization. Mechem, Agency, §§ 167, 178.

Lastly, it is argued that this was a sale by sample. Whilst the evidence indicates that samples were exhibited to the appellant, there was an ample *prima facie* showing that the sale was of two particular, identified lots, and that they were delivered to Bickford and by him caused to be put aboard the steamer Santa Barbara. However, this was a question of mixed law and fact, and should have been submitted to the jury under proper instructions. 2 Mechem, Sales, § 1321; Tiedeman, Sales, § 188.

We conclude, therefore, that the respondent made a *prima facie* case, and that the order directing a new trial was without error. The judgment will therefore be affirmed, and either party may use the same evidence upon a new trial.

FULLERTON, CHADWICK, MOUNT, CROW, and DUNBAR, JJ.,
concur.

[No. 7757. Decided March 23, 1909.]

PUGET SOUND NATIONAL BANK OF SEATTLE, *Respondent*,
v. H. M. FISHER, TRUSTEE, *et al.*, *Appellants*.¹

COURTS—JURISDICTION—QUIETING TITLE—VENUE. In an action to quiet title to land alleged to be situated in a certain county where the suit was brought, and to set aside the tax deed of another county which assumed to assess the lands, the court in the first mentioned county has jurisdiction to bind all parties who appeared in the action.

BANKS—NATIONAL BANKS—ACQUIRING TITLE TO REAL ESTATE—WHO MAY QUESTION. The title to real estate taken by a national bank is not void, and is voidable only at the suit of the government.

STATUTES—CONSTRUCTION—AMBIGUITY—COUNTIES—BOUNDARIES—EXTRINSIC EVIDENCE—ADMISSIBILITY—SUFFICIENCY. Where the statutory description of county boundaries is ambiguous and doubtful, it is admissible to show the contemporaneous construction placed thereon by the assumption and continuous exercise of jurisdiction over the territory by the officers of one county, in relation to roads, road districts, election precincts, school districts, and the candidacy for county offices and the voting of inhabitants of the territory, and the return and assessment of its property for taxation; evidence of such long continued, undisputed control being sufficient to show that the territory was included in such county.

Appeal from a judgment of the superior court for Jefferson county, Albertson, J., entered May 15, 1908, upon findings in favor of the plaintiff, in an action to quiet title. Affirmed.

E. M. Farmer and *Daniel Cross*, for appellants.

Harold Preston, for respondent.

¹Reported in 100 Pac. 724.

Mar. 1909]

Opinion Per DUNBAR, J.

DUNBAR, J.—Protection Island, upon which the land which is the subject of this controversy is situated, is an island in the Straits of Juan de Fuca, lying about two miles off the shores of Clallam county in front of, and a little to the west of, the entrance to Port Discovery Bay. At the time of the organization of Washington territory, Clallam county was a part of Jefferson county. The first territorial legislature undertook to create Clallam county out of Jefferson county, and division lines were sought to be established. Subsequent legislatures, commencing with the legislature of 1857-8, undertook by different acts to establish the boundary line between Clallam and Jefferson counties. The description of the northwest boundary line of Jefferson county was incorporated into the general description of the boundary of the two counties by the legislature of 1867 (Laws 1867, p. 45), and the legislature of 1869 again passed an act defining the county lines of several counties in the territory. The boundaries of Jefferson and Clallam counties were defined therein in the language of the act of 1867. The same language has been carried down through the different subsequent codifications of the statutes, and now reads as in the act of 1867.

The respondent's title is deraigned from the original purchasers of the land, and the appellants claim title through a tax deed issued out of the superior court of Clallam county. For many years taxes were levied and collected on this land only by Jefferson county, but in 1891 Clallam county assessed part of Protection Island. In 1892 the island was assessed only in Jefferson county. From 1893 up to the present time the officials of Clallam county have assessed the island as a part of Clallam county. The taxes were paid by the owner of the land to Jefferson county only; a tax certificate of delinquency for the years 1893-4-5 against said tracts of land was foreclosed; judgment and order of sale were subsequently entered, and in accordance with such transactions the land was sold to Clallam county, and a deed

issued therefor. Subsequently Clallam county sold said land; H. M. Fisher, the trustee of the appellants in this case, becoming purchaser therefor, it being expressly provided in the deed that there was intended to be conveyed thereby only such right, title, and interest in and to said lands as such Clallam county might have.

This action was brought to remove the cloud from respondent's title. Appellants, defendants in the court below, objected to the admission of the testimony, and demurred to the complaint on the ground that it did not state a cause of action, and that the court had no jurisdiction to try the cause. The demurrer being overruled, the appellants answered, setting up their title as acquired through Clallam county, and alleging that the land was duly assessed in Clallam county and was a part of Clallam county. The court granted a decree removing from respondent's title the cloud cast thereon by the execution and record of the said deed of Clallam county in Jefferson county, and quieting the title of the respondent against the appellants and each of them, and all persons claiming under them or either of them. From this judgment this appeal is taken.

There are three principal contentions in this case: (1) That the court had no jurisdiction to proceed with the trial of the cause, for the reason that it was an attempt to annul the judgment of a court of the same power and jurisdiction as the court before which this action was brought; (2) that the plaintiff, being a national bank, had violated the laws of Congress in regard to holding real estate as security, and that its title to the land thereby failed; (3) that the court had no right to admit contemporaneous testimony to determine the boundary line, and generally that the testimony did not sustain the findings of the court.

As to the first proposition, it is not necessary to discuss the question whether the county of Clallam would be bound by a judgment in this case. It is alleged in the complaint that the respondent is the owner of the land, that the land

Mar. 1909]

Opinion Per DUNBAR, J.

is situated in Jefferson county, and that the deed complained of constitutes a cloud upon its title. The judgment would certainly be binding upon all parties who appeared in this action, and that is sufficient upon the question of jurisdiction.

The second proposition of appellants has been set at rest by the supreme court of the United States in the case of *National Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188, where, after a review of the authorities, it was decided that, where a corporation was incompetent by its charter to take a title to real estate, a conveyance to it is not void but only voidable, that the sovereign alone can object, and that it is valid until assailed in a direct proceeding instituted for that purpose; the court citing Sedgwick, Statutory & Const. Constr., § 73:

“Where it is a simple question of authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract, the benefit of which he retains.”

This case was followed by *National Bank v. Whitney*, 103 U. S. 99, 26 L. Ed. 443, where the court says that the question presented is not an open one in that court, since the determination of the case of *National Bank v. Matthews* at the October term, 1878. To the same effect is *Reynolds v. Crawfordsville First Nat. Bank*, 112 U. S. 405, 5 Sup. Ct. 213, 28 L. Ed. 733. In fact, this is the universal authority on the subject, and the cases cited cannot be distinguished from the case at bar.

The court, upon the trial of this cause, found that the different laws upon the subject of the division of the counties was so doubtful that it could not be ascertained with certainty just where the boundary was intended to be located, and for that reason admitted the contemporaneous testimony complained of. From an examination of these different acts

we think the court was warranted in coming to the conclusion to which it did come. It would be of no benefit to set forth the descriptions of boundaries without accompanying maps of the waters of the Pacific Ocean and of the Straits of Juan de Fuca, and of other straits and inlets, which it would not be practicable to set forth in an opinion. The boundaries in dispute being located in the water, a simple statement without an accompanying map would be unintelligible, and we therefore satisfy ourselves by saying that the description is ambiguous and doubtful. The appellants cite some cases to sustain their contention that, in any event, under the circumstances as shown by this case, contemporaneous testimony is not admissible. But a careful examination of all of the cases cited convinces us that they do not warrant the conclusion reached by the appellants, and that the overwhelming weight of authority is to the contrary; that the rule is as announced in the case of *Russell v. Robinson & Co.* (Ala.), 44 South. 1040, where, it appearing that there was no record memorial of the measurement of distances from the island in question to the respective shores at the time of the enactment of the statute, the court said:

"It would seem that no higher and better evidence could be offered than that of the assumptive and continuous exercise of jurisdiction over the territory by one county for many years, extending back beyond the memory of living witnesses, and which jurisdiction was acquiesced in by the citizens of both counties to a comparatively recent time, . . . the recordation of ancient deeds and conveyances of land situate in the disputed territory in a particular county, and ancient records of tax assessments showing that the property was assessed for taxes for a particular county, and like facts tending to show assumption and exercise of jurisdiction and acquiescence therein by the citizens, are relevant and competent facts in evidence."

This text is sustained by the overwhelming weight of authority. Among the most pertinent cases see: *Edwards County v. White County*, 85 Ill. 390; *Hecker v. Sterling*, 36 Pa. St. 423.

Mar. 1909]

Opinion Per DUNBAR, J.

Coming then to the testimony, the court found, and the testimony shows, that immediately upon the passage of the act of 1858 the officers of Jefferson county assumed jurisdiction of said Protection Island, as a part of Jefferson county, and have continuously exercised such jurisdiction from that time to the present time, and are now exercising the same; that as early as the year 1860, by resolution of the board of county commissioners of said Jefferson county, Protection Island was expressly made a road district in Jefferson county, and that since 1862, and so long as there have been persons resident upon said island, said persons have voted in Jefferson county. It also appears that Protection Island has been a part of an election precinct in Jefferson county; that such residents have been summoned as jurors in the courts of Jefferson county; that in 1864 a resident of said island was a candidate at the general election for the office of sheriff of Jefferson county, and that the court, sitting in Jefferson county for the period aforesaid, exercised jurisdiction over said island, and said island has been a part of one of Jefferson county's school districts and one of Jefferson county commissioner's districts; and that all the instruments affecting the title to the land comprised in said island have been filed in the office of Jefferson county and not elsewhere, except that the Clallam county deed which is the subject of this action was recorded in the auditor's office of Jefferson and also in the auditor's office of Clallam county; that during the same period Clallam county has exercised no jurisdiction whatsoever over said island; that it has not been a part of any road district, school district, or commissioner's district of Clallam county, nor has it been a part of any election precinct of Clallam county, and no resident of the island has ever voted in Clallam county; nor has Clallam county ever assumed to have jurisdiction over the island except the assessment of taxes hereinafter referred to; that the assessment rolls of Jefferson county prior to the year 1877 have been lost or destroyed, but that an examination of the rolls of that

county year by year from 1877 to date shows that Protection Island was assessed by Jefferson county each of said years, and the taxes so assessed were uniformly paid.

One John M. Powers, who owned the island from 1871 to 1874, testified that so long as he owned the island he was assessed by, and paid taxes to, Jefferson county. John F. Tukey, who had lived on Port Discovery since 1853 and who was a member of the board of county commissioners of Jefferson county in the 60's, testified that the island was always assessed by Jefferson county. In 1860 the Jefferson county commissioners defined the Port Discovery road district, which included specifically, by government subdivision, the land embraced in Protection Island. In November, 1862, a petition was presented by ten citizens of Jefferson county to set Protection Island off into a separate road district, which petition was granted, and one Buffington who lived on the island was appointed road supervisor. In 1868 the Jefferson county commissioners included the island in road district No. 1, and in June, 1868, the island was made a voting precinct, and was so continued for several years after that. The uncontradicted testimony of the residents of the island was, that they voted in Jefferson county; that one Buffington, while residing on Protection Island, ran for county office in Jefferson county, and the county commissioners' records show that the canvass of votes for sheriff in 1864 set forth that Buffington received one hundred and fifteen votes for that office. In fact, without further specifying, the testimony is overwhelming to the effect that the jurisdiction of Jefferson county over the island is absolutely unquestioned, both by the organized authorities of the county and by the residents of the island. Under such a state of facts we think the court was amply justified in reaching the conclusion that the island was a part of Jefferson county.

The judgment will be affirmed.

FULLERTON, CHADWICK, MOUNT, CROW, and GOSE, JJ.,
concur.

Mar. 1909]

Opinion Per DUNBAR, J.

[No. 7764. Decided March 23, 1909.]

BENJAMIN GERBER, *Appellant*, v. MAURICE GERBER,
Respondent.¹

PLEADING—AMENDMENT — AFTER TRIAL — DISCRETION. It is discretionary to refuse to allow an amendment of the complaint, after the defense of an account stated had been tried out, where it would have necessitated a retrial on new issues, with a shifting of the burden of proof.

PLEADING—INCONSISTENT DEFENSES—DEPARTURE. In an action for an accounting, in which the defense was an account stated, a reply denying the statement of the account and a defense that the account stated was procured by fraud, are inconsistent defenses.

Appeal from a judgment of the superior court for King county, Yakey, J., entered December 20, 1907, upon findings in favor of the defendant, in an action for an accounting etc. Affirmed.

Philip Tworoger (*Joseph M. Glasgow*, of counsel), for appellant.

Leopold M. Stern, for respondent.

DUNBAR, J.—Plaintiff sued defendant below for an accounting and cancellation of a mortgage. The material part of the defendant's defense was that the defendant and plaintiff had had an accounting, and that there was an account stated and a full agreement arrived at in relation to the controversy between them; that the account stated was in favor of the defendant for the sum of \$1,094.18; and that, subsequently to said agreement, he had advanced to the plaintiff under said agreement the further sum of \$181.50, alleging that there was then due and owing to the defendant the sum of \$1,275.68, with interest. The plaintiff's reply was a denial of the affirmative allegation of the answer. The court

¹Reported in 100 Pac. 735.

found upon the trial of the cause that there had been an account stated, and entered a judgment for defendant, substantially as prayed for in the answer. From this judgment this appeal is taken.

It is contended by appellant that the court erred in refusing to allow him to amend his complaint by alleging, in substance, that, if there was an account stated, it was procured by fraud. In addition to the fact that there had been no offer to amend until after the question of whether an account had been stated had been tried out and decided against the appellant, so that the amendment would have necessitated a retrial of the case on new issues, with a shifting of the burden of proof, and that under such circumstances we would not interfere with the discretion of the court, we think the defenses were inconsistent under the rule announced in *Seattle Nat. Bank v. Carter*, 13 Wash. 281, 43 Pac. 331, 48 L. R. A. 177. The testimony offered in relation to the fraudulency of the transaction was not admissible under the pleadings.

So far as the merits of the controversy are concerned, an examination of the record convinces us that the overwhelming weight of the testimony sustains the judgment of the court. The judgment will therefore be affirmed.

FULLERTON, CHADWICK, MOUNT, CROW, and GOSL, JJ.,
concur.

Mar. 1909]

Opinion Per DUNBAR, J.

[No. 7364. Decided March 26, 1909.]

JOSEPH SMITH, *Appellant*, v. JANE E. GRAY *et al.*,
Respondents.¹

CANCELLATION OF INSTRUMENTS—RESCISSION FOR FRAUD—ELECTION OF REMEDIES—LACHES—TIME FOR SUIT—REASONABLENESS. An action for the rescission of the sale of lands, for fraud of the agent in showing the wrong property, is not commenced within a reasonable time, and is waived by the election of the remedy for damages, where it appears that the agents sold plaintiff land for \$1,500, which had been listed with them at \$1,000, that in August 1906, the vendor informed the plaintiff that the land shown by the agents was not the land listed or sold to him, and in the spring of 1907, the plaintiff, before bringing the present suit, commenced an action against the agent for \$500 damages upon hearing that the listed price was \$1,000 instead of \$1,500, and prosecuted no appeal from an adverse decision in such action.

Appeal from a judgment of the superior court for Spokane county, Warren, J., entered November 9, 1907, in favor of the defendants, after a trial before the court without a jury, dismissing an action for cancellation and rescission. Affirmed.

Davis & Davis, for appellant.

J. M. Geraghty and *Alex M. Winston*, for respondents.

DUNBAR, J.—This action was brought in the superior court of Spokane county, June 8th, 1907, to cancel and set aside a certain deed to real property in said county, made by defendants to appellant, and for a rescission of the sale of the land therein described. The complaint alleged fraud, in that the agents of the defendants sold and pointed out to appellant a certain five-acre tract of land adjoining Monroe Park addition to the city of Spokane, and represented that the said five-acre tract was the one defendants owned and desired

¹Reported in 100 Pac. 339.

plaintiff to buy; that plaintiff did buy the same, paying therefor the sum of \$1,500, and received from defendants a deed. It is alleged that, shortly prior to the commencement of this suit, plaintiff first learned that the deed did not describe the land shown him, but described a tract of land situate between a mile and a mile and a quarter north of the tract which was pointed out to him, being that much further away from the borders of the city of Spokane, and of comparatively little value. The defendants denied the material allegations of the complaint, and pleaded that they never listed this land with J. B. Moody, the real estate agent who showed the property to plaintiff, and that Moody was in no sense the agent of defendants, and that the said Moody bought the land after being shown the right piece, for a client of the said Moody, and paid the defendants therefor the sum of \$1,000. Upon the issues thus joined, the cause was brought to trial, and the court rendered judgment in favor of the defendants for costs. From this judgment this appeal is taken.

Moody and one Rogers, his partner in the real estate business, testified that respondent Gray listed a five-acre tract of land with them for sale, and pointed out to them on the map the land which they sold to the appellant. It seems that the property was listed, according to the testimony of Moody and Rogers, at the price of \$1,000, \$50 commission to be paid by the respondent, and that the land was sold to the appellant for \$1,500, the agents turning over to the respondent \$950. Whereupon a deed was made by the respondents to the appellant for the tract of land which it is conceded was not the tract of land which the agents pointed out to the purchaser, the appellant Smith.

An examination of the testimony in this case convinces us that a fraud was perpetrated upon the appellant, but that the respondents were not parties to such fraudulent misrepresentations. It is incontrovertible, however, that the respondents would be liable for the acts of their agent done in the

Mar. 1909]

Opinion Per DUNBAR, J.

line of his employment, and if this action for rescission had been brought within a reasonable time and without any intervening circumstances, which we will mention hereafter, the appellant would doubtless have been entitled to a judgment. It is well established that an action for rescission must be brought within a reasonable time. What a reasonable time is must be determined from the circumstances of the particular case. From the record of another case which was introduced in testimony, it appears that, in the spring of 1907, the appellant brought an action against Moody for \$500 damages, upon learning that the listed price of the land was \$1,000 instead of \$1,500. That action was determined against the appellant, and no appeal has been taken therefrom. It is testified by the appellant that, at the time this action was commenced, he did not know that the land which was deeded to him was not the land which he bought, and that shortly after he became aware of that fact, the present action was brought. But the testimony of the appellant in this regard is disjointed, uncertain, and almost unintelligible; while the respondent testifies in a direct, positive, and convincing manner that he informed the appellant, in August, 1906, that the land which had been shown to him was not the land which he (respondent) owned or had listed for sale; that the appellant and respondent went out and looked at the land which was shown to appellant and which was represented to be the land which was deeded to appellant, when the respondent informed him that the land which he had sold was not there in that neighborhood, nor anywhere near. The testimony on this controlling point being conflicting, and the court having had the witnesses before him, in addition to the fact that the testimony of the respondent to our minds seems to be more probable and convincing, we are of the opinion that the appellant became aware of this fraudulent transaction before the action for damages was brought and several months prior to the commencement of this action, and that in bringing such

action he elected to sue for damages, only, and thereby waived his right to an action for rescission.

The judgment is affirmed.

RUDKIN, C. J., MOUNT, CHADWICK, and FULLERTON, JJ.,
concur.

Crow and Gose, JJ., took no part.

[No. 7588. Decided March 26, 1909.]

C. V. NELSON, *Appellant*, v. TITLE TRUST COMPANY,
Respondent.¹

SPECIFIC PERFORMANCE—RELIEF—ACTIONS—FORM—VENDOR AND PURCHASER—RESCISSION OR DAMAGES. An action to compel the vendor to carry out his contract to convey certain lots as pointed out, or in the alternative for a rescission and return of purchase money, should not be dismissed for failure of proof where the plaintiff's evidence shows that he is entitled to damages or relief of any kind.

PRINCIPAL AND AGENT—FRAUD OF SUBAGENT—VENDOR AND PURCHASER. The owner of lots is responsible for fraudulent representations of a subagent employed by the firm who had a contract with the owner to sell the addition, where the owner was the beneficiary of the transaction.

VENDOR AND PURCHASER—RESCISSION BY VENDEE—FRAUD OF AGENT—MISREPRESENTING LAND. The purchaser of lots is entitled to relief for fraud where it appears that an agent, authorized to sell and provided with a plat indicating a park that did not exist, showed the lots as staked on the ground, and the park, and after a temporary contract was made and money paid, the stakes shown were moved and a new plat filed, cutting off part of the lots shown as desirable for a building site, and platting the park site into lots, affecting the value of the lots sold.

SAME—DEFENSES—NEGLIGENCE OF VENDEE. In such a case, the fact that the new plat was filed before the contract was consummated, and that the contract recited that the purchaser had examined the lots as replatted, would not preclude a recovery because of negligence, where the plaintiff lived a long distance from the lots, was not aware of the change, and was misled into signing the contract.

¹Reported in 100 Pac. 730.

Mar. 1909]

Opinion Per DUNBAR, J.

Appeal from a judgment of the superior court for King county, Morris, J., entered February 8, 1908, dismissing at the close of plaintiff's case, an action for specific performance or in the alternative for a rescission of a contract to convey land, after a trial before the court without a jury. Reversed.

Willett & Willett and Raymond G. Wright, for appellant.

Cutts & Dorety (M. M. Lyter, of counsel), for respondent.

DUNBAR, J.—The defendant, Title Trust Company, on November 3, 1906, was owner of what is known as "Delmar Park Addition to the City of Seattle." On November 3, 1906, J. F. Erickson, an agent of the defendant, sold the plaintiff lots 8 and 9, of block 2, of said addition, signing what might be termed a temporary contract for the purchase of said lots. Erickson showed plaintiff a plat of Delmar Park addition, and pointed out to him the land marked "Park" on a blue print of said addition that he had with him. He also showed him the grade stakes of the streets, and the stakes which marked lots 8 and 9, in block 2. According to the complaint of the plaintiff, relying on these representations, he agreed to purchase said lots 8 and 9 for \$3,000, and paid down the sum of \$300. By the terms of the contract, \$700 more was to be paid on signing a permanent contract, \$1,000 in nine months, and \$1,000 in eighteen months.

After the selection and purchase of the lots aforesaid, plaintiff went to Bellingham, where he lived, and did not return until about the 28th of December, 1906. In the meantime the defendant had changed the stakes to lots 8 and 9, in block 2, shortening the lots by from eighteen to nineteen feet, and cutting off the level part of the lots which Erickson, the agent, had pointed out to plaintiff as adapted for building purposes. The park which was marked and pointed out originally had been platted into lots to be sold, and this second plat was filed with the auditor. Not knowing anything

of the changes made, plaintiff entered into the contract, paying the \$700 required. The complaint also alleges other derelictions on the part of defendant, viz., that it had agreed to grade, lay cement walks, put in water mains, etc., and had failed to do so at the time of the commencement of this action.

After signing the contract, plaintiff returned to Bellingham, and did not return to Seattle until June, 1907, when he alleges that he, for the first time, learned of the changes in and about his lots, and of the failure of the defendant to carry out its contract, and this action was brought to compel defendant to carry out its contract and convey lots 8 and 9 as first staked on November 3, 1906, and for damages done, or in the alternative for a rescission of the contract, a return of the money, and additional damages, and for general relief. The defendant answered, denying the main allegations of the complaint, and interposing a cross-action for a forfeiture of the contract against plaintiff. To this cross-action, plaintiff answered. On the close of the plaintiff's case, defendant moved for a dismissal. The court granted the motion, which also carried the dismissal of the cross-complaint with it. Plaintiff moved for a new trial on the ground of the insufficiency of the evidence to justify the decision, and that the decision was against the law, and error in law occurring at the trial and excepted to at the time by plaintiff.

In passing upon the motion to dismiss, the court said:

"It may be you have an action for damages in a court of law. I am not prepared to say. I am not convinced of that, but I do not think you can maintain this case with this proof. The motion is granted and exception allowed to the plaintiff."

If the appellant had proved a cause of action of any kind, under the uniform holdings of this court he ought not to have been dismissed from the court burdened with costs and compelled to commence another action. We judge from the remarks interjected by the court during the trial that it entertained the view that the owner of the land was not responsible to the purchaser for the fraudulent representation of

Mar. 1909]

Opinion Per DUNBAR, J.

its selling agent. This, we think, was a wrong theory of the law. The owner is the beneficiary of the sale. The salesmen are his agents, and under the ordinary rule of agency the owner is responsible for the representations of his agent made in the line of his employment. It is true that the agency in this case is one degree removed, Erickson who sold the lots to appellant having been employed by Arnold & Nachant, the firm who had a contract with the owner to sell the addition, Arnold & Nachant agreeing to divide with Erickson their commission on lots sold by him. But this was a mere detail as to the manner of sale by Arnold & Nachant. The owner was still equally the beneficiary of the transaction, and it would tend to encourage fraudulent misrepresentation if such owner were allowed to escape responsibility through the subterfuge of having the sale made by a subagent. It must not be allowed to disclaim responsibility and at the same time receive the benefit of the fraudulent transaction.

In this case Erickson testifies, that he was authorized to sell this land; that he was provided with a plat of the land which showed a park that did not exist, and which showed the location of the lots which appellant bought; that he pointed out the lots to the appellant, on the face of the earth, as they were indicated and staked off, that they were bought by the appellant with reference to said stakes; and that the agent pointed out to the purchaser the topographical advantages, especially calling his attention to the fact, as an inducement to buy, that there was a nice level building place on the lots; that after appellant purchased, the stakes were moved eighteen or nineteen feet, completely changing the character and value of the land, and that the land described on the new plat was not, to that extent, the land purchased by the appellant; that the park did not appear on the second plat, and that there were material changes in many ways, rendering the lots sold less valuable. It is true that, at the time the contract was entered into, the new plat was filed; and it is also true that the contract recites that the appellant was acquainted with

the title to, and the location of, the lots, and that he had examined the property as at present platted and staked. But we think it plainly appears that he was misled into signing this contract; that he was not aware that the stakes had been changed and that he was not guilty of such a degree of negligence as should preclude him from recovering because he did not make a second examination of the lots. He lived at a long distance from the lots. He had them pointed out to him once by the agent of the owner, and it would not naturally occur to him that there was any necessity to view them again.

On the record before us, we think the appellant was entitled to relief, but as the testimony of the respondent is not before us, even though it is responsible for the fact, a new trial will be granted. It is so ordered.

RUDKIN, C. J., FULLERTON, MOUNT, CROW, GOSE, and CHADWICK, JJ., concur.

[No. 7545. Decided March 26, 1909.]

THE CITY OF SEATTLE, *Respondent*, v. JOHN C. REGAN & COMPANY *et al.*, *Appellants*.¹

INDEMNITY—AGREEMENT TO SAVE HARMLESS FROM JUDGMENTS—CONCLUSIVENESS OF JUDGMENTS—NEGLIGENCE OF CITY CONTRACTOR—BONDS. In an action upon a contract and bond of indemnity given by sidewalk contractors and their surety, wherein they agreed to save the city harmless from all actions and judgments for damages by reason of the negligence of the contractor, a judgment recovered against the city in an action the defense of which was duly tendered to the contractors and surety, is conclusive against them of the fact that a defect existed in the street, and was not properly guarded; the only question remaining being whether the contractors were the responsible cause of the defect.

SAME—CAUSE OF ACCIDENT—EVIDENCE—SUFFICIENCY—MUNICIPAL CORPORATIONS—STREETS. In an action upon an indemnity bond there is sufficient evidence to sustain a finding that sidewalk contractors were responsible for a defect in a street, consisting of protruding

¹Reported in 100 Pac. 731.

Mar. 1909]

Opinion Per FULLERTON, J.

spikes left after tearing up planks, where one of their employees testified to having torn out the planks, although he claimed that he drove down all protruding spikes and nails, it having been conclusively determined in another action that he was mistaken in such claim.

SAME—DEFENSES—DISCHARGE OF INDEMNITORS—DILATORY OBJECTIONS—EFFECT OF WAIVER. The fact that an action against a city for damages was prematurely commenced, after rejection of the claim (the charter provisions requiring a delay of sixty days) and waiver of the objection by the city's counsel, is not a bar to a recovery over against contractors and a surety upon an indemnity contract and bond to save the city harmless from the action, where they refused to appear and defend; since the same amounted to only a dilatory objection and would not have barred another action.

Appeal from a judgment of the superior court for King county, Griffin, J., entered May 1, 1908, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action upon an indemnity bond. Affirmed.

Roberts & Hulbert, for appellants.

Scott Calhoun and Bruce C. Shorts, for respondent.

FULLERTON, J.—In July, 1903, John C. Regan & Company entered into a contract with the city of Seattle by the terms of which they agreed, for a stated consideration, to construct concrete sidewalks between certain designated points. The contract was in writing and contained, among others, a condition to the effect that the contractors would erect and maintain good and sufficient guards, barricades and signals at all unsafe places at or near where the work contemplated in the contract was to be done, and would indemnify and save harmless the city of Seattle from all suits and actions of every name and description brought against the city for or on account of any injuries or damages received or sustained by any person by reason of the failure of the contractors to erect and maintain such guards, barricades or signals, or by or in consequence of any negligence on the part of the contractors, their agents or employees, while carrying on the work. The contractors, also, at the time of entering

into the contract, gave a bond to the city, with the appellant National Surety Company as surety, conditioned that they would faithfully perform all of the conditions of the contract. The contractors thereafter entered upon the performance of the work, and while so engaged, one Margaret Brennan, while passing along the street where the work was being carried on, caught her foot on some large nails or spikes that had been left protruding through a girder of an old wooden walk, the top boards of which had been removed to make room for the cement walk, and was thrown down and injured.

The accident to Mrs. Brennan occurred August 20, 1903, and on September 14 thereafter she duly filed with the city clerk of the city of Seattle a claim for damages, as prescribed in the city charter. This claim was rejected by the city, and on October 3, 1903, she brought an action in the superior court of King county against the city to recover for her injuries. The city, conceiving that the obstruction causing the injury was one for which the contractors were liable, served a written notice upon them and their surety notifying them of the pendency of the action, and tendering them its defense. Neither the contractors nor the surety appeared, and the city itself defended. The case was twice tried to a jury. The first trial resulted in a verdict for the city. This verdict was set aside by the trial court, and on appeal its order to that effect was affirmed by this court. *Brennan v. Seattle*, 39 Wash. 640, 81 Pac. 1092. On the second trial a verdict was returned against the city for \$999, and a judgment entered against it for that sum, with costs. This judgment was likewise affirmed by this court on the appeal of the city. *Brennan v. Seattle*, 46 Wash. 427, 90 Pac. 434. The city thereupon paid the judgment and brought the present action against the contractors and their surety on the bond to recover the amount so paid. The case was tried before the court sitting without a jury, and resulted in a judgment in favor of the city for the amount paid in satisfaction of the judgment Mrs.

Mar. 1909]

Opinion Per FULLERTON, J.

Brennan recovered against it. From this judgment the contractors and surety appeal.

The principal assignments of error question the sufficiency of the evidence to sustain the judgment. It is contended that the court gave too great an effect to the judgment obtained by Mrs. Brennan against the city; that it held that the negligence of John C. Regan & Company was conclusively established by that judgment; that it denied the appellants the right to dispute liability for the defect which it is alleged caused the injury to Mrs. Brennan; and that, at the final argument and hearing, it excluded all evidence of the appellants on the question of guards and barricades and all evidence on the question whether the injury occurred upon the work of the contractors. Our examination of the record, however, convinces us that the court's ruling was not so broad as these objections would indicate.

The judgment offered in evidence, since the appellants were notified of the pendency of action in which it was obtained and were given an opportunity to defend that action, was conclusive of every fact necessary to be proven in order to entitle the plaintiff therein to recover; that is to say, it was conclusive evidence of the existence of the defect in the street, of the primary liability of the city for existence of such defect, of the fact that the plaintiff in that action was injured without fault on her part, and of the amount awarded her in the judgment. It was not, of course, conclusive of the fact that the contractors were the cause of the defect on which the plaintiff was injured. But when the city proved the contract and bond, by which it appeared that the appellants had undertaken to save the city harmless from an action for damages brought against it by negligence on the part of the contracting appellant, and proved the judgment obtained against it by Mrs. Brennan, and so much of the judgment roll therein as showed the nature of the defect on which the recovery was had, and the fact that the appel-

lants had been given timely notice to defend that action, nothing remained to be proven in order to make a case against the appellants other than the fact that the contractors were the responsible cause of the defect for which the recovery was had. The city was not obligated to show, as the appellants argue, that the defect must have been upon some part of the work they were engaged in constructing. They could not, without incurring liability upon their bond, throw the materials of the old sidewalk it was necessary for them to remove into the middle of the street merely because their work did not extend to that part of the street; nor could they, without incurring such liability, take up the boards and leave exposed girders containing dangerous nails and spikes, even though the boards so removed were outside of their work, and it was no part of their duty to remove that part of the walk. Nor did the trial judge deny to the appellants the right to introduce evidence tending to show that they did not cause this defect. On the contrary, he gave them the fullest opportunity to show this fact; he merely denied their right to contest anew the question whether any defect existed at the place where the injury was alleged to have occurred, and whether the defect, if it did exist, was properly guarded. *Denny v. Sayward*, 10 Wash. 422, 39 Pac. 119; *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649; *Spokane v. Costello*, 33 Wash. 98, 74 Pac. 58; *Spokane v. Costello*, 42 Wash. 182, 84 Pac. 652; *Seattle v. Saulez*, 47 Wash. 365, 92 Pac. 140; *American Bonding Co. v. Loeb*, 47 Wash. 447, 92 Pac. 282; 23 Cyc. 1273d; 24 Am. & Eng. Ency. Law (2d ed.), p. 740.

The next objection raises the question of the sufficiency of the evidence to justify the finding of the court to the effect that the contractors were responsible for the defect which caused the injury recovered for in the action of *Brennan v. Seattle*, *supra*; but without entering upon a review of the evidence at length, we think it decidedly preponderates

Mar. 1909]

Opinion Per FULLERTON, J.

in favor of the finding. One of the employees of the contractors testified that he himself tore up the old walk at the place of the injury, and that it was torn out for its full width. In this he is corroborated by a number of witnesses who testified as to the condition of the place immediately before and after the accident. It is true this witness states that he drove down all of the spikes and nails that were left protruding by the removal of the boards of the walk; but as to this, if he were not mistaken in fact, the question was concluded against the appellants by the result of the other trial, as that was a question, and a necessary question, at issue in that trial. We are of opinion, therefore, that the trial judge correctly determined the issues of fact.

The city charter of the city of Seattle provides that no action shall be begun against the city on a claim for personal injuries until sixty days have elapsed from the time the claim for such damages is filed with the city. This action, as will be observed from the dates above given, was begun within less than sixty days after the filing of the claim with the city, although not until after it had been rejected by the city council and notice thereof given the claimant. After the action had been begun this objection was waived by the city's counsel, and this waiver is thought to relieve the appellants from liability, since, as they contend, the objection if raised would have been fatal to the maintenance of the action. But we think this objection not tenable. It may be that had the objection been insisted upon, this particular action could not have been maintained. But the dismissal of this action for that reason would not have been a bar to the prosecution of another action for the same cause, and only a few days delay could have been gained at most by an insistence upon the objection. As a defense, therefore, it was no more potent than any other dilatory motion counsel might have filed and insisted upon. But it is not the rule that a defendant must, in this kind of a case, insist on every objection that sug-

gests itself in order to be able to bind the person liable over to him for any recovery that may be had therein. He is only required to exercise good faith and avoid fraud and collusion to be entitled to so recover. The purpose of the notice to the person liable over is to give him a chance to make such defenses to the action as he deems fit. But to make such defenses he must come into the action. He cannot stay out of the case and at the same time dictate to his principal what defenses shall be interposed. This would be giving him the double advantage of having such issues determined as he wished determined without subjecting himself to the corresponding hazards arising from their presentation, and such is not the policy of the rule.

We have not overlooked the case of *Seattle v. Northern Pac. R. Co.*, 47 Wash. 552, 92 Pac. 411. While a majority of the court think a correct result was arrived at in that case, we think the language used in some instances was unwarranted and contrary to what had been previously decided by us. To the extent that it is thus conflicting we do not feel constrained to follow it.

The judgment appealed from is affirmed.

RUDKIN, C. J., CROW, DUNBAR, CHADWICK, and GOSE, JJ., concur.

MOUNT, J.—I concur in the result in this case, but not in the criticism of *Seattle v. Northern Pac. R. Co.*

Mar. 1909]

Opinion Per MOUNT, J.

[No. 7633. Decided March 26, 1909.]

M. W. GAY, *Respondent*, v. JACOB SCHAEFER, *Appellant*.¹

APPEAL—REVIEW—AMENDMENTS TO CONFORM TO PROOF. Upon an appeal, the complaint will be deemed amended to conform to the facts in an action tried by the court without a jury, where the evidence is brought up.

FRAUDS, STATUTE OF—PROMISE TO PAY DEBT OF ANOTHER—CHATTEL MORTGAGES—ASSUMPTION OF DEBT BY PURCHASER. A promise by the purchaser of mortgaged chattels to pay the mortgage debt if the mortgagee would consent to the transfer, makes the debt the debt of the purchaser, and is not within the statute of frauds, and need not be in writing.

CHATTEL MORTGAGES—ASSUMPTION OF DEBT BY PURCHASER—ATTORNEY'S FEES. The assumption of a mortgage note by the purchaser of mortgaged chattels, includes the attorney's fee provided for in the note.

Appeal from a judgment of the superior court for King county, Morris, J., entered March 28, 1908, upon findings in favor of the plaintiff, granting a deficiency judgment, in an action on a note and to foreclose a chattel mortgage, after a trial before the court without a jury. Affirmed.

H. E. Foster, for appellant.

Edward Brady and *Geo. H. Rummens*, for respondent.

MOUNT, J.—This action was brought to foreclose a chattel mortgage given by the defendant A. V. Frost, to secure a promissory note for \$550, and interest. Jacob Schaefer was made a party defendant, upon an allegation in the complaint that the mortgaged property was conveyed from Frost to Schaefer upon consideration that the latter should pay the debt, and that this promise was made by said Schaefer direct to the plaintiff in order to obtain plaintiff's consent to such conveyance. The defendant Frost defaulted. Defendant Schaefer, after a motion to separately state the

¹Reported in 100 Pac. 334.

causes of action had been denied, answered, denying generally all the allegations of the complaint. Upon a trial the court found the issues in favor of the plaintiff, and entered a decree foreclosing the mortgage and providing for a deficiency judgment against both defendants. The defendant Schaefer appeals from that judgment.

The principal points made by the appellant are that there was no promise on the part of the appellant to pay the debt of Frost, and if there was such a promise, it was not in writing and was therefore void under the statute of frauds. A point is attempted to be made upon the insufficiency of the complaint, but inasmuch as the case is here upon the facts, we shall not notice the question made upon the pleadings, which are treated as amended if necessary to conform to the facts.

It seems that in July, 1906, the respondent was the owner of a printing plant, consisting of type, presses, etc. At that time the defendants Frost and Schaefer agreed to purchase the plant from respondent for \$1,500. Schaefer paid cash for his half interest, and Frost gave his note for \$550, the balance due on the purchase price of his own half interest, and also gave a mortgage back on an undivided one-half interest in the property to secure the payment of the note. This mortgage given by Frost to the respondent Gay provided that the mortgaged property should not be sold without the consent of Mr. Gay. About this time Schaefer and Frost entered into a partnership in the printing business. After a time Schaefer desired to purchase the interest of Frost, and thereupon promised respondent Gay that, if he would consent to a transfer of the mortgaged property by Frost to him, he (Schaefer) would pay the balance of the debt from Frost to Gay. Gay agreed to this, and the transfer was made. The note was not paid, and this action resulted.

There is some conflict in the evidence as to whether the appellant agreed to pay the debt due from Frost to respond-

Mar. 1909]

Opinion Per MOUNT, J.

ent, but the respondent's evidence and the surrounding circumstances show pretty conclusively that he did so promise, and we think the finding of the trial court to that effect is amply sustained.

It is not claimed that the promise was in writing, and it is not necessary that it should be. This is not a mere promise to answer for the debt of another. The promise was made upon consideration that the respondent would consent to a transfer of the mortgaged property from Frost to the promisor. Consent was given by the respondent, and the transfer was thereupon made. The debt thereby became the debt of the promisor, and is not within the statute of frauds. *Silsby v. Frost*, 3 Wash. Ter. 388, 17 Pac. 887; *Gilmore v. Skookum Box Factory*, 20 Wash. 703, 56 Pac. 934; *Johnson v. Shuey*, 40 Wash. 22, 82 Pac. 123, and cases there cited. In the last case we said:

"Such a promise does not, of itself, discharge the original debtor, nor does it have that effect when the creditor seeks to collect his debt from the new promisor. The effect of such a promise is, as between the original debtor and his assignee, to make the assignee the principal debtor and the original debtor a surety, but it gives the creditor a right of action against both of them, which he may pursue jointly or severally, as suits his convenience."

Under this rule and the facts found, the appellant was clearly liable for the whole debt, which included the attorney's fees provided for in the note.

There is no error in the record, and the judgment is therefore affirmed.

RUDKIN, C. J., CROW, DUNBAR, GOSE, CHADWICK, and FULLERTON, JJ., concur.

[No. 7567. Decided March 26, 1909.]

E. M. CORNELIUS *et al.*, Respondents, v. WASHINGTON
STEAM LAUNDRY, Appellant.¹

MECHANICS' LIENS—NOTICE—VERIFICATION—DEFECTS—AMENDMENT ON APPEAL. That the verification of a lien notice stated the notice to be "true" instead of "just" goes to the form rather than the substance, and is without prejudice and will be considered amended on appeal, where the record fails to show that the defect was pointed out below.

SAME—PLEADINGS—ISSUES—LIEN NOTICE—AMENDMENT—APPEAL—OBJECTIONS. Where the complaint alleges the due execution and filing of a claim for lien, attached to and made a part of the complaint, and the answer does not deny the execution and admits the filing, the perfection of the lien is an admitted fact; since the lien may be amended and all objections to its sufficiency must be raised below at the time it is offered.

SAME—FORECLOSURE—EVIDENCE OF DEBT. In an action to foreclose a mechanics' lien there is sufficient evidence of the debt and that it was due, where the parties had agreed that a certain part of it was due, the balance to be adjusted on final settlement.

SAME—DEFENSES—PAYMENT BY NOTE—EVIDENCE—SUFFICIENCY. In an action to foreclose a mechanics' lien, findings that the debt was not paid by a note are sustained, where there was testimony that the note was only given that the claimants might negotiate it if possible, and was returned by them next day and left on refusal to accept the return, and that it was sent back to claimants by mail the next day, since which both parties disclaim knowledge or possession of it, although there was conflicting evidence.

SAME—DEFENSES—LEASEHOLD—PERSONALTY. In the foreclosure of a mechanics' lien upon a building constructed by the defendant holding a leasehold interest, the defendant cannot raise the question that part of the labor and material furnished is personalty and not subject to a lien; as the lien is subject to the lease, and whatever is done becomes part of the leasehold.

SAME—ITEMS LIENABLE—PROFIT ON LABOR. The judgment on a lien for labor and material furnished in the construction of a building may include a commission of fifteen per cent on the cost, as profit, where the contract provides therefor, and defendants offer no evidence to support their denial of the contract.

SAME—INTEREST. Interest is allowable on a mechanics' lien from the date of filing of the lien notice.

¹Reported in 100 Pac. 727.

Mar. 1909]

Opinion Per CHADWICK, J.

SAME—DECREE—DESCRIPTION OF LIEN—APPEAL—DECISION. That a decree foreclosing a mechanics' lien fails to describe the lien notice is not ground for reversal, where the court had jurisdiction and the rights of third parties are not involved and the whole record discloses that the decree was proper.

SAME—AMOUNT OF LAND—LEASEHOLD—APPEAL—REVIEW. It is not ground for reversal of a decree foreclosing a mechanics' lien on a leasehold that the amount of land to be sold was not described, since the leasehold would probably have to be sold as an entirety, especially where the record discloses no reference to the point in the court below.

SAME—PROCEDURE. Under Bal. Code, § 5917, all proceedings on the foreclosure of a mechanics' lien are to be liberally construed.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered April 10, 1908, upon findings in favor of the plaintiffs, after a trial on the merits, in an action to foreclose a mechanics' lien. Modified.

O. C. Moore, for appellant.

John L. Dirks, for respondents.

CHADWICK, J.—This action was brought by plaintiffs to recover the value of materials furnished and services rendered in the construction and installation of a laundry plant, operated by defendant in Spokane, Washington. Plaintiffs allege the contract between the parties, the value in money of the services and labor, part payment, a balance due of \$1,444.81, and the due execution and filing of a mechanics' lien to secure that amount. They also allege that defendant holds the property sought to be charged, as lessee, under a term beginning October 1, 1907, and continuing for ten years. A copy of the lien notice is attached to the complaint, properly referred to, and made a part thereof. They pray for a foreclosure of the lien, together with the incidents of a recovery in such cases.

Defendant, after admitting its possession under a lease expiring October 1, 1917, denies that it employed plaintiffs to perform labor or furnish materials in the construction or

installation of a laundry plant, that it ever agreed to pay plaintiffs for labor or materials, that they furnished any labor or material, that the value of the labor and materials was as alleged in the complaint, that any sum has ever been paid, and that there is a balance due of \$1,444.81. It "admits that the instrument referred to and attached as an exhibit to the complaint was filed in the office of the county auditor." No further reference is made to the lien. As a further defense, defendant alleges that, during the time mentioned in the complaint, plaintiffs performed certain work in the way of plumbing and pipe fitting in the building occupied by it, the exact value of which it cannot state, and that on the 1st day of February, 1908, certain payments having been made on account, it was agreed between the parties that there was a balance due of \$1,200, and that defendant should execute a note for that amount, due one year after date, payable to the order of the plaintiffs, and bearing interest at the rate of eight per cent per annum; that in pursuance of the said agreement the note was executed and delivered; whereupon defendant asked that plaintiffs' suit be dismissed. The further defense was denied by plaintiffs. The case coming on for trial, the court found the amount due from defendant to plaintiffs to be \$1,420.86, together with \$200 attorney's fees, and further adjudged and decreed that the leasehold interest of defendant be sold to satisfy the judgment. From this decree, defendant has appealed.

The assignments of error, twenty in number, may be summarized as follows: (1) That the lien was defective; (2) that the lien was not established; (3) that the debt was not due; (4) that there was no proof of the debt, or that the labor and material entered into the structure; (5) that the lien is barred by the execution of the note; (6) that attorney's fees should not have been allowed; (7) that nonlienable items were included; (8) that a commission was improperly allowed; (9) that interest was improperly included in the judg-

Mar. 1909]

Opinion Per CHADWICK, J.

ment; (10) that the decree is not broad enough to warrant a sale of the premises.

(1) The alleged defect in the lien notice is in this, that while the verification says that the lien notice is true, it omits to say that it is just. The defect goes to the form rather than the substance of the lien, and was subject to amendment. There being no offer or request to amend in the court below, we shall assume that the objection was not there pointed out or, if pointed out, the lien was held to be sufficient under the authority of *Johnston v. Harrington*, 5 Wash. 73, 31 Pac. 316, and *Fairhaven Land Co. v. Jordan*, 5 Wash. 729, 32 Pac. 729. If the lien notice were in fact defective, "this court will treat a defective lien notice as it does a defective pleading and consider it as amended in all cases where substantial justice has been done and the defect complained of has not operated to the injury of the complaining party." *Olson v. Snake River Valley R. Co.*, 22 Wash. 139, 60 Pac. 156.

(2) Respondents insist that there was no issue on the question whether or not a lien had been perfected on the appellant's property. Reference to that part of the answer hereinbefore quoted will show that appellant admits the filing of the lien notice, and does not deny that the lien was duly executed. Respondents alleged that, for the purpose of securing and perfecting a lien, they duly executed and filed their claim of lien, and they attached a copy of the lien so executed and filed to their complaint. It thus became a part of the complaint. It has been repeatedly held that all objections going to the sufficiency of the lien notice should be raised at the time it is offered; *Seattle & Montana R. Co. v. Corbett*, 22 Wash. 189, 60 Pac. 127. This upon the theory that, under our liberal lien laws, a lien may be amended, and if no issue is taken or objection made, the court will hold the lien to be sufficient. That this rule puts an unwarranted burden on the defendant, in that the duty of pointing out the way of preparing a proper lien

is imposed upon him, is untenable. The object of a pleading is to ascertain and place before the court the ultimate fact; and in lien cases, by the implied mandate of the statute, a court will not refuse to foreclose a lien that may be amended. The reason of the rule announced in the cases makes it imperative that we hold that the lien as well as its filing should be admitted or denied. It was not denied. It therefore stands an admitted fact, requiring no evidence to sustain it.

(3 and 4) We are not disposed to go into the question that the debt was not due. The evidence shows conclusively that the parties agreed that at least the sum of \$1,200 was due, since which time no payments have been made, and appellant Sonneman admits in his testimony that, if on final settlement more than that amount was found to be due, it would be adjusted. Nor are we prepared to say that the court erred in finding that the amount of labor and material furnished claimed by respondents is not as stated by them.

(5) Appellant relies principally upon its further and separate answer, that a note was given for the amount due, which was payable in one year, thus rendering this action premature. This question was before the lower court. The testimony with reference to the giving of the note is conflicting. Appellant maintains that it was given absolutely, while respondents insist that it was given in order that the respondents might, if possible, negotiate it for appellant. A few days after it was given, respondents endeavored to return it to appellant's manager Sonneman, and upon his refusal to receive it, it was left on the counter. The next day it was returned by mail to respondents. Both parties now disclaim knowledge or possession of it. There is sufficient testimony to warrant a conclusion in favor of either party. The trial court had the witnesses before him and could observe their manner, judge of their credibility, and weigh the testimony with precision, and his findings in this regard will be sustained. Appellant insists, however, that the court did not make any findings upon this issue. It is true that he

Mar. 1909]

Opinion Per CHADWICK, J.

did not make any finding upon this issue, nor did appellant request it. *Bank of California v. Dyer*, 14 Wash. 279, 44 Pac. 534. The judgment rendered is inconsistent with any other theory than that the court found that the note was not accepted as a payment of the amount due.

(6) This assignment is disposed of by the foregoing discussion.

(7) It is urged that at least a part of the labor and material furnished by respondents is personalty and not subject to a mechanics' lien. Appellant cannot raise this question. It is holding under a lease, and whatever was done becomes a part of its leasehold estate. *Dobschuetz v. Holliday*, 82 Ill. 371. The purchaser would take *cum onere*. The lien is subject to the conditions of the lease and subordinate to the rights of the lessor. *Rothe v. Bellingrath*, 71 Ala. 55; *Gas-kill v. Trainer*, 3 Cal. 334.

(8) If it was agreed between the parties that respondents should receive a commission of fifteen per cent on the cost of labor and material as their profit—and the lower court has so found, appellant having offered no testimony in support of its denial of the contract—we feel warranted in holding, under the authority of *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389, that they are entitled to recover on this item.

(9) The court allowed interest from the 31st day of December, 1907. It was held in *Huetter v. Redhead*, 31 Wash. 320, 71 Pac. 1016, that interest might properly be allowed from the date of filing the lien notice. Interest should have been allowed from February 7, 1908.

(10) It is urged that the decree is void because it does not describe the lien or decree its foreclosure. Courts will refer to the whole record when called upon to pass upon the form of a decree of a court having jurisdiction of the parties and the subject-matter, and the rights of third parties are not involved. When so treated, the objection finds no favor. It is also urged that the court should have deter-

mined the amount of land to be sold to satisfy the judgment. It is most likely that a leasehold interest would have to be sold as an entirety. If not, the record does not disclose any reference to this point in the court below, and we therefore presume that the court was satisfied that the whole interest should be included in the decree. *Kerr, Mechanics' Liens*, § 932.

For the reasons hereinbefore suggested, and in obedience to the direction of the legislature that all proceedings of this nature shall be liberally construed to effect their objects (*Bal. Code*, § 5917; *P. C.* § 6119), we conclude that the errors complained of are not such as would warrant a reversal and re-trial of this case. The judgment and decree is modified in accordance with this opinion. Respondents will recover costs on appeal.

RUDKIN, C. J., MOUNT, DUNBAR, and FULLERTON, JJ.,
concur.

Crow and Gose, JJ., took no part.

[No. 7780. Decided March 26, 1909.]

O. P. BURROWS *et al.*, Respondents, v. F. F. WILLIAMS *et al.*,
Appellants.¹

COMPROMISE AND SETTLEMENT—PAROL EVIDENCE TO VARY WRITING—BURDEN OF PROOF. Parol evidence to overcome the written record of a settlement must be clear, cogent, and convincing.

SAME—EVIDENCE—SUFFICIENCY—RESULTING TRUSTS. Where a partnership or profit-sharing contract was settled by the acceptance of a give or take proposition, and deeds were made to the purchasing partners by the vendor of his interests in such of the real estate as was held partly in his name, there is no clear, cogent, and convincing testimony of an oral agreement to leave out of the settlement certain other tax title lands already held in the name of the purchasers, or to overcome the presumption of a full settlement and show a resulting trust in favor of the vendor, where by his

¹Reported in 100 Pac. 340.

Mar. 1909]

Opinion Per CHADWICK, J.

testimony the vendor claimed that such oral agreement was made because of the expectation of a decision by the supreme court respecting the tax title and the consequent uncertainty as to its value; when in fact the tax deed had just been issued and suit to set it aside was not instituted by the former owners until six months later, after which and about two years later, the supreme court sustained the tax title, and during all that time the purchasers treated the tax title lands as their own and defended the suit at their own expense, the vendor taking no interest therein, and where the two purchasers flatly contradicted the testimony of the vendor.

Appeal from a judgment of the superior court for Chelalis county, Irwin, J., entered June 8, 1908, upon findings in favor of the plaintiffs, in an action to declare a trust and quiet title, after a trial before the court. Reversed.

John C. Hogan, for appellants.

Morgan & Brewer, for respondents.

CHADWICK, J.—On the 21st day of May, 1901, O. P. Burrows was the agent of the owner of certain lands in Chelalis county. Williams & Johnson were engaged as co-partners in the logging business, on the Humptulips river. By a previous arrangement Burrows had obtained permission to log the lands belonging to his principal. Burrows was not engaged in the logging business. In order to carry out his purpose and to turn his opportunity into profit for himself, and Williams & Johnson being prompted by a desire to extend their logging operations, the following agreement was entered into:

“This agreement made on this 21st day of May, A. D. 1901, by and between F. F. Williams and C. E. Johnson, co-partners in business under the firm name and style of Williams & Johnson, parties of the first part, and O. P. Burrows, of Hoquiam, Washington, party of the second part, witnesseth:

“That the parties hereto have and do hereby agree to log off the merchantable timber in sections three and four in Twp. 18 north of range 11 west of W. M., and sections 27

and 28 in Twp. 19 north of range 11 west of the W. M., as described in logging contract hereunto attached.

"The parties of the first part shall furnish the plant and capital sufficient to carry on said logging operations. Out of the proceeds of the logs sold off said property, shall be paid the stumpage due for the same, and next an amount sufficient to reimburse said parties of the first part for the amount expended by them for plant and wages paid to labor on same, together with interest on such amounts at the rate of ten per centum per annum, all of which shall be considered a first lien on the amounts first received on the logs. The said C. E. Johnson, one of the parties of the first part herein, shall receive as wages for his personal services in running the camp of the parties conducting said operations the sum of — dollars per month, which sum shall in arriving at the net proceeds of the business be considered as an expense of such operations and rank as labor. The net proceeds of this enterprise shall be divided as follows, to wit: One-third to said party of the second part, and two-thirds to the parties of the first part herein. This agreement shall be binding upon the parties hereto and to each of their heirs, executors, administrators and assigns.

"In witness hereof the parties hereto have hereunto set their hands and seals the day and year first above set forth.

"Williams & Johnson, (Seal)

"O. P. Burrows, (Seal)"

Thereafter stumpage contracts were entered into between Hiscock, the owner of the land, and Williams & Johnson, a firm, and O. P. Burrows. Before beginning logging operations on the Hiscock lands, other lands were bought and logged off by the parties. In dealing with the public, no concern was taken of Burrows. All contracts, aside from deeds and stumpage contracts, were made, and the business carried on, in the name of Williams & Johnson. A bank account was carried in the name of Williams & Johnson, which was replenished from time to time by the sale of logs and money borrowed on the individual credit of Williams & Johnson. At the time the contract was entered into, Williams & Johnson had in boom on the Humptulips river

Mar. 1909]

Opinion Per CHADWICK, J.

about five million feet of logs. These were also sold and the proceeds turned into the bank. Additional equipment and machinery for logging was purchased from time to time. The parties carried on a logging business under the contract from May 21, 1902, until the 13th day of January, 1903, when the business relations between them ceased. The lower court held, among other things not material to our present inquiry, that:

"The proceeds of logs put in by Williams & Johnson which had come to market under the contract of May 21, 1901, and which proceeds were collected by them and turned into the bank account of Williams & Johnson at the First National Bank, were never sufficient at any time up to January 13, 1903, to reimburse Williams & Johnson for moneys expended and paid out of their individual funds for carrying on such logging operations.

"The total amount deposited in the bank account of Williams & Johnson during the period of May 21, 1901, to January 13, 1903, was made up of the following items:

Cash from Geo. L. Davis loan.....	\$ 3,257.50
Proceeds of Williams & Johnson notes to the bank for loans.....	13,000.00
Gray Harbor Com. Co. check for logs..	854.71
American Mill Co. checks for logs.....	15,136.33
Panel Folding & Box Co. for logs.....	450.00
Cash deposits (probably from logs)....	7,004.25

Total\$40,315.46

"From May 21, 1901, the date of the agreement between Williams and Johnson and O. P. Burrows and up to the transfer from Burrows to Williams & Johnson on January 13, 1903, the proceeds of the sale of logs in which Williams & Johnson and O. P. Burrows were interested, were insufficient to reimburse Williams & Johnson for expenditures made by them in logging said lands and no dividends or profits had ever been declared or divided between Williams & Johnson and O. P. Burrows under the agreement of May 21, 1901."

No profits appearing, and the parties being mutually dissatisfied, after some preliminary negotiations, a give and

take proposition was made by Williams & Johnson, which was accepted by Burrows. He was paid the sum of \$3,000 in cash for his one-third interest in the business. Burrows and wife made deeds to Williams & Johnson for a one-third interest in and to all of the real property owned by Burrows and Williams & Johnson in common. At the time the title to all of the land so conveyed stood in the names of the three parties to the contract.

On September 13, 1902, the account of Williams & Johnson was overdrawn at the bank. To cover this overdraft and to create a fund to meet the needs of the business, Williams & Johnson borrowed the sum of \$2,000, for which Williams executed a note in the name of Williams & Johnson. On the 20th day of September, 1902, Burrows took out four delinquency tax certificates covering land in Chehalis county, Washington. On September 29, he made an assignment of two of them, covering two hundred and forty acres of land, to F. F. Williams, by which he in terms conveyed all his "right, title and interest of, in and to the within delinquency certificates to F. F. Williams," and in terms authorized "the treasurer of Chehalis county to pay the redemption money therefor or issue a deed for the property therein described to the said F. F. Williams." Burrows paid for the tax certificates the sum of \$301.69, out of his own funds. But on September 22, 1902, Williams drew a check upon the account of Williams & Johnson for that amount, in consideration of which Burrows assigned the certificates to him. It was paid out of the credit created by the \$2,000 note.

Burrows ordered the deputy prosecuting attorney to attend to the foreclosure of the certificates retained by him, as well as those assigned to Williams, and from time to time manifested an interest in the speedy culmination of these proceedings. He also directed the prosecuting attorney to bid in the lands at tax sale in the name of, and to have the deed executed to, Williams. All expenses of foreclosure, and sale, however, were paid by Williams, probably out of the funds

Mar. 1909]

Opinion Per CHADWICK, J.

carried in the name of Williams & Johnson. The tax deed was issued by the treasurer of Chehalis county on January 8, 1908, ten days before the settlement of January 13, and was recorded January 19, at the request of George D. Robertson, who was acting for Williams. The deed was returned to Williams when recorded.

This case was brought by Burrows and wife, praying for a decree establishing a trust in the tax title lands, and praying that Williams and wife, in whom the record title then stood, be required to make a deed to an undivided one-third interest therein. The court below found in favor of Burrows, and defendants have appealed.

It is the theory of respondents that, by reason of the fact that the money for the tax title lands was paid out of the funds carried in the name of Williams & Johnson during the life of the agreement theretofore entered into between the parties, a trust resulted in their favor. As we have said, a general settlement was had between the parties to the partnership or profit-sharing enterprise (it is not material to decide which it was, although the question is discussed at some length in the briefs) at which time, in addition to the settlement of the personal estate of the concern, respondent O. P. Burrows deeded his interest in the land standing in part in his name to appellants Williams and Johnson. An attorney was present, and the papers were drawn by him, and presumably under his direction and advice. The question quite naturally, occurs why, if the tax title lands were property in which Burrows and Williams & Johnson each had a one-third interest, a like deed was not made by Williams to Burrows, inasmuch as a deed had been issued by the county and was in the possession of Williams? Respondent O. P. Burrows says:

"Q. How did you arrive at the basis of three thousand dollars for your interest? A. Mr. Williams asked me what I would take for my interest and after considering it for a few days I made an estimate in a rough way of the logs we

had in the water. We knew the books in the office showed how many logs we sold and that book is not here. I figured up the value of our property and I made him an offer to sell all that we possessed, tax land and all, putting in the tax land at one thousand dollars. At that time my interest in there was five thousand and some odd dollars. I remember that it was a little over five thousand dollars. Mr. Williams said let us take the tax land out of the question as we have nothing to buy or sell there yet; the title is not perfect—some time the supreme court will pass on our tax title and we can settle that afterwards. Q. He mentioned the fact that the case was going to the supreme court and was pending and therefore he was not in a shape to deal? A. I was not in a shape to deal for my interest in the tax land and we agreed to leave the tax land in his name. Q. Until the supreme court had passed on it? A. Until the supreme court had passed on it. He then made me an offer. He made me a give or take offer. He came back at me with an offer outside of the tax lands valuing the property at nine thousand dollars. That would give me three thousand dollars for my interest or make six thousand for theirs. I was not in a position to buy them out in the first place and I was not a logger. I sold to them all my interest with the exception of the interest in the tax lands. It was left in that shape. I trusted him implicitly. I never doubted his word or doubted that my interest was as safe with him as it was with me until he refused to pay me for it on "H" street about the time of the starting of this suit. I never doubted him in any way, and on that day he told me that I did not have any interest in it and I sued him in about twenty minutes after that for my interest. That is as near as I can remember the identical condition of the transaction from start to finish exactly as it occurred. . . .

"Q. And that is the reason you assign that the tax title land was left out of the transaction—the fact that it was in litigation? A. Yes, sir. It had been. No, don't understand me to say that when I sold the tax title land was in litigation. No, sir; I didn't say that. Q. It wasn't? A. No, sir. Mr. Williams held a deed from Chehalis county, a tax deed, that is all we had for it, and the supreme court had not passed on the legality of the deed and Mr. Williams or myself at that time did not know whether we had a deed to a piece of

Mar. 1909]

Opinion Per CHADWICK, J.

land or a deed to an amount of money plus fifteen per cent. Only a short time after that this particular piece of land happened to be taken up to the supreme court. Q. You say that the supreme court was mentioned at that time? A. The supreme court was mentioned—that the title should be settled by the supreme court soon or some time in the future. Q. Was it Williams' intention to take it to the supreme court? A. No. We were waiting simply for some one to settle the tax title. We didn't know that this particular piece of land was going to be the piece that would settle this tax title. This particular piece happened to be the one."

Appellant Williams testified as follows:

"Q. You heard Mr. Burrows' statement that at the time he sold out his interest under that contract of May 21st, 1901, that there was some verbal conversation that he was to reserve his interest in the tax land in order that the matter might be litigated—something of that sort. Was there anything of that sort said? A. There was not. Q. Did Mr. Burrows ever make any claim to this land until he brought the suit? A. He never did until a very few days before he brought this suit. Q. Ever mention it to you? A. Never did. Q. Ever have any conversation with him putting him off? A. No, sir. Q. You heard his conversation to that effect? A. Yes, sir. Q. You did not have anything of the kind? A. No, sir."

It is also insisted by respondent O. P. Burrows that he frequently spoke of the land and his interest in it to the appellant F. F. Williams, between the time of the settlement and the beginning of this action, and that his interest had never at any time, until just prior to the commencement of this action, been denied. On the other hand, both Williams and Johnson testified positively that he never mentioned the matter, and that no notice of his claim was ever brought to either of them until just before the suit was brought.

There is a direct conflict of evidence, but there are two reasons—one of law and the other of fact—that seem to resolve the doubt upon this particular question in favor of

appellants. It is established that evidence to overcome the record of a transaction written by the parties to it, must be clear, cogent, and convincing. The fact which intervenes to bar the theory of respondents is this, that at the time of the settlement, when he says that it was agreed to abide a decision of the supreme court, a tax deed had just been issued, and there is nothing in the record to show that an appeal would ever be prosecuted in the tax foreclosure proceeding, nor had the parties any reason to believe there ever would be. The case referred to in the evidence was the case of *Williams v. Pittock*, 35 Wash. 271, 77 Pac. 385. It was brought here upon appeal from an order sustaining a demurrer to a petition to vacate the tax foreclosure judgment, which was not filed in the lower court until about July 20, 1903, or more than six months after the settlement. The petitioners, the former owners of a part of the property, predicated their right to open the tax foreclosure judgment for alleged irregularities, upon the ground that they knew nothing of the tax proceeding or judgment until July 1, 1903. So far as the parties to this action are concerned, the property was in as good condition for settlement and division then as it ever would be. This being so, we are driven irresistibly to the conclusion, that respondent Burrows is mistaken; that the probable issue of an appeal was not discussed at the settlement, and it was not decided by the parties to allow the tax title lands to remain *in statu quo* in the name of Williams pending the decision of this court. If he did not say at that time what he now says that he said, it is established beyond the peradventure of a doubt that he did not say anything about the tax title lands, and that the settlement was made on the theory that he claimed no interest in them at the time. This conclusion is further sustained by the fact that Burrows took no interest in the appeal. He did not offer, nor did Williams & Johnson ever ask him, to contribute anything toward the payment of the costs and at-

Mar. 1909]

Opinion Per CHADWICK, J.

torneys' fees. It also appears that nearly two years elapsed after the decision of this court in the case of *Williams v. Pittock*, before action was begun to recover his alleged interest. The fact that Williams & Johnson during all that time treated the land as their own and made contracts with reference to it, without consulting with or considering Burrows, is a circumstance, the evidence being conflicting, that is entitled to weight. Respondent O. P. Burrows further says, in explanation of the fact that the land now in controversy was not included in the settlement, that he had absolute confidence in Williams, and considered his interest as secure in his name as in his own.

But the fact remains that the parties were engaged in the settlement of the disputed accounts of an unsatisfactory, and according to the findings of the court below, an unprofitable, business venture. There appears to be no reason why the matter should be left as a matter of confidence between the parties. They were engaged in a general settlement, and no attack upon the title was anticipated or threatened. The law raises a strong presumption of fact that when parties are so engaged they will consider and settle every existing difference. "Courts do not encourage the overturning of settlements voluntarily made and long acquiesced in." 8 Cyc. 533. In the case at bar, although in equity respondents may have had (although we do not so decide) an interest in the property, they can only overcome the presumption arising from the settlement, and declare a trust, by testimony so clear and convincing that the court can free the transaction from all doubt as to the intent of the parties. *Spencer v. Terrel*, 17 Wash. 514, 50 Pac. 468; *Burke v. Fuller*, 41 La. Ann. 740, 6 South. 557; *Desha v. Smith*, 20 Ala. 747; *Wells v. Erstein*, 24 La. Ann. 317; *Murray v. Ellston*, 24 N. J. Eq. 310; *Little v. Little*, 2 N. D. 175, 49 N. W. 736; 47 Cent. Dig. § 137; *Peterson v. Martin*, 28 N. C. 111.

The last case cited is in point on a give and take proposi-

tion. A partner made an advance of \$808.12 to the firm, taking a note signed by his partner. Upon dissolution no actual account of the note was taken, the partner making the advance agreeing to take a certain amount for his share, the other partner to take all the assets and pay all debts of the firm. The court said:

"Indeed, a state of the firm, if truly made, must have shown this as an outstanding debt, with the others. But nothing of the kind was prepared. It appears, indeed, that an inventory of the debts to the firm and of the other effects, (except the merchandise,) had just been taken; but it is obvious, that was a mere list of debtors, and of the amount of the debts on their face, and it did not ascertain the good and bad debts, and compute the true value. It was not an estimate of the assets of the concern, or an account of the respective partners in company. This is put beyond doubt, by the fact stated in the articles that the goods, in which the plaintiff was, as far as they would go, to be paid the \$6,000, had not been inventoried, nor their value determined. No list of the debts, owing by the firm, appears to have been taken. The conclusion, then, seems certain, that this was a bargain for a dissolution without striking a balance, and at a venture on each side. The inference follows, that when the plaintiff took out of the common property \$6,000 for his share, it was for his whole share thereof, and not merely for his original stock and a conjectural profit. The memorandum given to the plaintiff by his partner, can make no difference in law. It is only one evidence of the advance, and is no better than an entry in the books to the plaintiff's credit. We suppose that this sum of \$808.12 was, of course, to the credit of his account; and the difficulty is to distinguish and say, that the \$6,000 did not extinguish that credit, as well as one for the plaintiff's original share of the capital. In fine, when the plaintiff, one of the partners, took a large sum, exceeding all his advances of every sort, and took it without computing either profit or loss, and without saying on what accounts in particular he received it, the legal conclusion must be, that it was meant to cover his entire share, and extinguish every demand he had on the effects of the firm; for one item of his demand can be no more said to survive than

Mar. 1909]

Syllabus.

another. Therefore, although third persons might have debts against the firm, the partner, thus provided for on a dissolution, could not be said to have them."

A careful review of the evidence convinces us that respondents have failed to overcome the presumption arising from the settlement had between the parties on January 13, 1903, and for that reason the decree of the lower court should be reversed. This conclusion makes it unnecessary to discuss the other questions suggested in the briefs of counsel. This case is reversed with instructions to the lower court to enter a judgment in favor of appellants.

RUDKIN, C. J., FULLERTON, MOUNT, and CROW, JJ., concur.

DUNBAR and GOSE, JJ., took no part.

[No. 7617. Decided March 27, 1909.]

ANNIE HARRIS *et al.*, *Respondents*, v. PUGET SOUND ELECTRIC RAILWAY, *Appellant*.¹

APPEAL—REVIEW—VERDICT—CARRIERS. The finding of a jury that a pass issued to an employee, whose duty took him over the line from place to place, was a part of the consideration for his services and not a gratuity, is conclusive where that was one of the principle issues in the case.

CARRIERS—FREE PASS—EXEMPTION FROM LIABILITY—EMPLOYEES. Where a pass is issued to an employee as part of the consideration for his services, a clause exempting the carrier from liability for negligence is void as against public policy.

SAME—FREE PASS—IN CONSIDERATION OF WAGES—EVIDENCE—CUSTOM—ADMISSIBILITY. Upon an issue as to whether a pass issued to an employee, who was required to travel back and forth over the road, was in part consideration for his services, it is admissible to prove a general custom of the carrier to furnish transportation to such employees as a part of their wages, it being relevant to show that such a contract was probable.

¹Reported in 100 Pac. 838.

SAME—INJURY TO PASSENGERS—ISSUES AND PROOF—GRADES—DESCRIPTION OF LOCALITY. In an action for damages from a head end collision of interurban electric cars, in a cut, it is not error to admit evidence as to the grades and curves not alleged in the complaint, when confined to the locality, and the jury are instructed at the time that it was only for the purpose of describing the situation at the place where the accident occurred.

SAME—NEGLIGENCE—FAILURE TO FLAG TRAIN—VICE PRINCIPALS. The negligence of a flagman to notify a train of another train approaching through a cut, is a nondelegable duty of the carrier, rendering the carrier liable to another employee traveling as a passenger, although other alleged acts of negligence were not proved.

SAME—FACT OF ACCIDENT—PRESUMPTION. The fact of a collision between electric trains raises a *prima facie* case of negligence as regards a passenger on the train.

SAME—WHO ARE PASSENGERS—EMPLOYEE WITH PASS. An employee having no duties on the train and traveling on a pass furnished in consideration of his employment, has paid his fare, and is a passenger, whether riding on the time of the company or not.

DAMAGES—DEATH—EXCESSIVE VERDICT. A verdict for \$15,000 for the death of the foreman of a "bonder gang" on an electric railway, a bright, active man of good habits, 41 years of age, earning \$115 per month, with a wife and two children, is not excessive.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 17, 1908, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for the death of an employee. Affirmed.

James B. Howe and *Hugh A. Tait*, for appellant.

Blaine, Tucker & Hyland and *Robert C. Saunders*, for respondents.

MOUNT, J.—This action was brought by the plaintiffs to recover against the Puget Sound Electric Railway, and W. S. Dimmock, its manager, for the death of W. L. Harris, caused by alleged negligence of the defendants. The cause was tried to the court and a jury. The trial resulted in a judgment and verdict in favor of the plaintiffs for \$15,000, against the railway company. The company appeals.

On December 26, 1906, and for a long time prior thereto,

Mar. 1909]

Opinion Per MOUNT, J.

the appellant was engaged in operating an electric railway between the cities of Seattle and Tacoma. The deceased W. L. Harris, on that date and for some time prior, had been in the employ of the appellant as foreman of a "bonder gang." It was his duty to maintain and keep in repair the bonds or electric connections between the rails of the track, and the third rail carrying the electric power whereby the trains were operated. At the time of his death and for some time prior, the deceased lived with his family at Kent, a station about midway between Tacoma and Seattle. His duties required him to be at different places on the line of railway, to make repairs, and he was required to travel over the line from place to place with his crew of men. The appellant furnished him a pass, which he and the men under him were in the habit of using in going from place to place. This pass read as follows:

"Puget Sound Electric Railway. Quarterly ticket. 1906. Pass W. L. Harris and five men, bonders. Void after Dec. 31, 1906. No. 641. W. S. Dimmock, Manager."

Upon the back of the pass was printed the following:

"CONDITIONS.

"This free ticket is not transferable and if presented by any other person than the individual in whose name it is issued, if altered by erasures, additions or interlineations, or in case any questions arise between the conductor and the holder as to its validity or the right of the bearer to use it, the conductor will take up this ticket, collect fare, and report the case to the superintendent. The signature of the holder of any pass presented and not taken up must be written upon the blank (Form A-901) provided for that purpose when presented by the conductor with the spacings properly filled in, when the conductor will take up the blank and ring for it upon the register as a ticket. The person accepting this free ticket agrees that the Puget Sound Electric Railway shall not be liable under any circumstances, whether of negligence by its agents or otherwise, for any injury to the person or

for any loss or damage to the property of the passenger using the same.

"I accept the above conditions. W. L. Harris.

"This pass will not be honored unless signed in ink by the person for whom issued."

On the morning of December 26, 1906, the deceased boarded one of the appellant's southbound passenger trains at Kent, known as train No. 3, for the purpose of going to Tacoma, where his duty at that time called him. He was accompanied by his son Otto, who at that time was employed as a member of the bonder gang. When train No. 3, upon which Mr. Harris and his son were riding, arrived at Edgewood, a small station between Kent and Tacoma, a flagman, who had been trusted to notify the officer in charge of train No. 3 that another train was approaching from the opposite direction, failed and neglected to so notify the officers of train No. 3. The result was a head-on collision, in a cut a short distance out of Edgewood, between train No. 3 and a work train, No. 626. In this collision Mr. Harris received injuries from which he soon thereafter died. His son Otto was also severely injured. At the time of the accident, the deceased did not have his pass with him, but he had signed the form A-901 referred to in the pass. The conductor was also killed. It was shown that the conductor had not punched the blank form No. A-901, as was his custom, but it appears reasonably certain that the deceased was riding by virtue of the pass. Other facts necessary to an understanding of the points raised will be stated in connection therewith. Appellant assigns some twenty-seven errors, but they are discussed under eight different heads. We shall notice them in the same way.

It is first argued that the judgment is erroneous for the reason that the deceased, at the time of his injuries, was riding upon a free pass containing a contract exempting appellant from liability. One of the principal issues in the case

Mar. 1909]

Opinion Per MOUNT, J.

was whether the pass was a mere gratuity from the appellant to the deceased, or whether it was given upon consideration of the hire of deceased and as a part consideration for his wages. This question was submitted to the jury, and we must now, in view of that issue and of the finding of the jury, necessarily conclude that the pass was not a gratuity, but was a part consideration for the wages of the deceased. In a note found on page 557, 4 Am. & Eng. Ann. Cases, the rule is thus stated:

"The decisions are not in harmony as to the effect to be given to a provision in a free pass exempting the carrier from liability for injuries caused by its negligence or that of its servants. According to one view, such an exemption is contrary to public policy and not enforceable."

As sustaining this view a number of cases are cited, among them *Mobile & Ohio R. Co. v. Hopkins*, 41 Ala. 486, 94 Am. Dec. 607; *Rose v. Des Moines Valley R. Co.*, 39 Iowa 346; *Jacobus v. St. Paul etc R. Co.*, 20 Minn. 125, 18 Am. Rep. 360, and other cases. The note then continues:

"In other jurisdictions the view is taken that there is no violation of law or public policy by an agreement on the part of the pass holder that the carrier shall not be liable for injuries caused to him by its negligence or that of its servants."

In support of this rule are cited a number of cases, among which are *Northern Pac. R. Co. v. Adams*, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513; *Boering v. Chesapeake Beach R. Co.*, 193 U. S. 442, 24 Sup. Ct. 515, 48 L. Ed. 742; *Payne v. Terre Haute R. Co.*, 157 Ind. 616, 62 N. E. 472, 56 L. R. A. 472; *Rogers v. Kennebec Steamboat Co.*, 86 Me. 261, 29 Atl. 1069, 25 L. R. A. 491, and other cases. This court, in *Muldoon v. Seattle City R. Co.*, 7 Wash. 528, 35 Pac. 422, 38 Am. St. 901, 22 L. R. A. 794, and 10 Wash. 311, 38 Pac. 995, 45 Am. St. 787, held to the last-named rule, where the pass was a mere gratuity. But in *Peterson v. Se-*

attle Traction Co., 23 Wash. 615, 63 Pac. 539, 65 Pac. 543, 53 L. R. A. 586, at page 645, we said:

"But we expressly hold that if the respondent's transportation constituted a portion of the consideration for his services, he became a passenger for hire, just the same as anybody else who parts with anything of value for transportation."

It follows from this rule, and from the finding of the jury, that the transportation in this case was not a gratuity, but constituted a part consideration for the deceased's services; that the deceased was a passenger for hire and entitled to protection as such passenger, which public policy does not permit him to waive.

It is next claimed that the court erred in receiving evidence relating to the terms of the employment between appellant and third persons. The evidence was to the effect that the appellant employed other persons, in bonding and other work on the road, where such employees were required to travel back and forth on the road, and that it was the practice and general custom of the appellant to furnish transportation in substantially the same form, and that it was stated by the manager of the company that such transportation was a part consideration for wages, in some instances amounting to \$15 per month. While it is true, as a general rule, that evidence of a contract with one person is not evidence of the terms of a contract with another, yet where the evidence is offered to show a general custom, in such cases it is admissible.

"It is held by this court, in common with many other courts, that in controversies where a special agreement is alleged on the one side and denied on the other, it is relevant to put in evidence any circumstance which tends to make the question more or less probable; this not to change the contract but as evidence of what it was." *McCowan v. Northwestern Siberian Co.*, 41 Wash. 675, 84 Pac. 614.

See, also, *Warwick v. Hitchings*, 50 Wash. 140, 96 Pac. 960; *Dimmick v. Collins*, 24 Wash. 78, 63 Pac. 1101; *Wheel-*

Mar. 1909]

Opinion Per MOUNT, J.

er v. Buck & Co., 23 Wash. 679, 63 Pac. 566. We think this evidence was proper under the issues in the case.

Appellant argues that the court erred in admitting evidence as to the grades and curves of the track, and as to cuts through which it runs. Evidence of this kind was admitted, but it was confined to the immediate vicinity of the accident and for the purpose of "describing the situation where the accident occurred," and not as tending to prove negligence not charged in the complaint. This was clearly stated to the jury, and we are satisfied the jury was not misled. It was therefore not error.

It is next argued that the negligence alleged was not proved. Several acts of negligence were alleged in the complaint, in substance that appellant failed to notify either train No. 3 or train No. 626 of the approach of the other; that appellant failed to provide a safe and adequate means of notifying its employees of the movements of trains; that appellant failed to promulgate adequate rules for the protection of the trains; failed to adopt a safe train order system; and failed in its duty to employ a careful and experienced train dispatcher. It was not necessary for the respondents to prove all these alleged acts of negligence. It was the duty of the appellant, as a common carrier of passengers, to use the highest degree of care in transporting its trains from one point to another. The accident was caused by the negligence of a flagman to notify the two trains of the approach of each other upon the same track. It is true, the dispatcher gave the order to the flagman, and if the flagman had done his duty the accident would not have occurred. The flagman, however, let No. 3 go by him without notifying the train that another train was approaching upon the same track. The prime duty rested upon the appellant to avoid a collision of the two trains. The appellant could not delegate that duty to another, and escape liability if that other should become neglectful. The negligence of the flagman, therefore,

became the negligence of the railway company itself, as between the company and the passengers upon its trains. This specific act of negligence was clearly proven. The mere fact that the collision occurred was sufficient to make a *prima facie* case of negligence so as to place the responsibility upon the appellant. *Williams v. Spokane Falls & N. R. Co.*, 39 Wash. 77, 80 Pac. 1100; *Firebaugh v. Seattle Elec. Co.*, 40 Wash. 658, 82 Pac. 995, 111 Am. St. 990, 2 L. R. A. (N. S.) 836; *Jordan v. Seattle, Renton etc. R. Co.*, 47 Wash. 503, 92 Pac. 284; *Russell v. Seattle, Renton etc. R. Co.*, 47 Wash. 500, 92 Pac. 288. We are satisfied that the first alleged ground of negligence was clearly proven, and it is therefore not necessary to consider the evidence tending to prove others.

Appellant next argues that certain instructions given and refused were erroneous. This contention is based upon the theory that the deceased was not a passenger upon the train, but was a mere employee, entitled to none of the rights of a passenger. The deceased had no duties to perform upon the train. He was there solely for the purpose of being transported from Kent to Tacoma. If he had paid his fare he certainly would have been a passenger, the same as any other person traveling on the train. There is no evidence that he paid his fare in money for this particular trip, but we think it is reasonably certain that he was riding by virtue of the pass above set out. This pass, as we have seen above, was not furnished to him as a mere gratuity, but was furnished him by reason of his employment, and in consideration thereof. He was at liberty to use it for his private business or the business of appellant. If he were using it upon his private business, he was a passenger entitled to protection as such. *Peterson v. Seattle Traction Co.*, *supra*; *Doyle v. Fitchburg R. Co.*, 166 Mass. 492, 44 N. E. 611, 55 Am. St. 417, 33 L. R. A. 844.

There was some evidence to the effect that, after he boarded

Mar. 1909]

Opinion Per MOUNT, J.

the train at Kent, he was traveling upon the time of the railroad company, and many authorities hold that employees carried free under such circumstances are not to be considered as passengers. 6 Cyc. 643; 5 Am. & Eng. Ency. Law (2d ed.), 516. But whether the deceased was riding upon his own time or that of the appellant makes no difference if he paid his fare. It is reasonably certain in this case that he paid his fare, for the transportation was found to have been issued upon sufficient consideration, and was not given to him as a mere gratuity. We think, therefore, the instructions were not erroneous.

It was last contended that the verdict and judgment is excessive. The deceased at the time of his death was forty-one years of age, earning on an average \$115 per month. He was a bright, active, industrious man of good habits. He left a wife and two children. This amount is large, but we are not convinced that it is excessive.

We find no error in the record, and the judgment must therefore be affirmed.

RUDKIN, C. J., CROW, DUNBAR, FULLERTON, CHADWICK, and GOSE, JJ., concur.

[No. 7478. Decided March 27, 1908.]

OTTO HARRIS, by his *Guardian Ad Litem*, *Annie Harris*,
Respondent, v. PUGET SOUND ELECTRIC
RAILWAY, *Appellant*.¹

CARRIERS—PASSENGERS—EMPLOYEE RIDING ON PASS—EMPLOYMENT—QUESTION FOR JURY. In an action for injuries sustained by the son of the foreman of a bonder gang, riding to his work upon a pass granting transportation to the foreman and five employees, there is sufficient evidence to go to the jury on the question whether the foreman was authorized to employ the son, under a contract to pay \$1.50 a day and furnish transportation, where the boy testified that such was the contract and the pass showed on its face authority to carry other employees.

SAME—WHO ARE PASSENGERS—BURDEN OF PROOF. Where an employee is rightfully on a train as a passenger, he is entitled to be carried as such unless the waiver of his rights is shown.

Appeal from a judgment of the superior court for King county, Tallman, J., entered January 25, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action by an employee for injuries sustained in a railway collision. Affirmed.

James B. Howe and *Hugh A. Tait*, for appellant.

Blaine, Tucker & Hyland and *Robert C. Saunders*, for respondent.

MOUNT, J.—This action was brought to recover for personal injuries received by Otto Harris, in the same collision in which his father was killed, as stated in *Harris v. Puget Sound Elec. R.*, ante p. 289, 100 Pac. 838. The case was tried to the court and a jury, resulting in a judgment in favor of respondent for \$2,000. The defendant appeals.

The same points are presented in this case as were presented in that case. The decision in that case controls this. The further point is made in this case, however, that there

¹Reported in 100 Pac. 841.

Mar. 1909]

Statement of Case.

is no evidence to show that the father was authorized to employ his son under an agreement to pay \$1.50 per day and furnish transportation upon the appellant's trains to and from his work. The boy testified that such was the contract. The pass itself shows upon its face that the father was authorized to carry other employees with him. We think this is sufficient to go to the jury upon the question of authority. But further than this, the boy was rightfully upon the train as a passenger, and was entitled to be carried as such (*Bradburn v. Whatcom County R. & L. Co.*, 45 Wash. 582, 88 Pac. 1020), unless it was shown by the appellant that he had waived his rights as a passenger. It was not so shown. There is no error in the record, and the judgment must therefore be affirmed.

RUDKIN, C. J., CROW, FULLERTON, GOSE, and DUNBAR, JJ., concur.

[No. 7472. Decided March 27, 1909.]

ANNIE HARRIS, *Respondent*, v. PUGET SOUND ELECTRIC
RAILWAY, *Appellant*.¹

JUDGMENTS—PERSONS CONCLUDED—PARENT AND CHILD—FORMER ACTION BY GUARDIAN—EMANCIPATION OF MINOR. In an action by a parent to recover expenses incurred for treatment and loss of services of a minor child, injured in a railway accident, a former action by the guardian of the child, to recover for the minor's personal injuries, is not an emancipation of the child or a bar to a recovery by the parent, where in the former action recovery for expenses and loss of services was expressly excluded from the consideration of the jury.

Appeal from a judgment of the superior court for King county, Tallman, J., entered January 25, 1908, upon findings in favor of the plaintiff, and a stipulation, in an action to recover for expenses and loss of services of a minor child. Affirmed.

¹Reported in 100 Pac. 841.

James B. Howe and Hugh A. Tait, for appellant.

Blaine, Tucker & Hyland and Robert C. Saunders, for respondent.

MOUNT, J.—This action was brought by the respondent to recover certain expenses, and for loss of earning capacity of her minor son during infancy, by reason of personal injuries received by her son in a collision, as stated in *Harris v. Puget Sound Elec. R.*, ante p. 289, 100 Pac. 838, and *Id.* ante p. 298, 100 Pac. 841. This case was tried to the court without a jury and was based upon the same state of facts as shown in the other two cases. It was stipulated that, in the event the court should find in favor of the plaintiff and against the defendant, the amount of recovery should be fixed in the sum of \$1,000. The trial court found that the plaintiff was entitled to recover, and entered a judgment for \$1,000. The defendant has appealed.

The questions decided in the other two cases are conclusive of the same questions presented in this case. The contention made in this case, in addition to what was made in the other two, is that the bringing of case No. 7473 by the mother was an emancipation of the minor by her, and *Daly v. Everett Pulp & Paper Co.*, 31 Wash. 252, 71 Pac. 1014, and *Donald v. Ballard*, 34 Wash. 576, 76 Pac. 80, are relied upon. In these cases, however, there had been one recovery by the guardian for the minor, and it was held that there could not be another recovery for items which had already been settled or recovered in a former action. In this case there has been no previous recovery for loss of wages during minority of the son Otto, nor for expenses of the mother incurred in treatment for his injuries. These items were expressly excluded from the consideration of the jury in the action brought by the minor through his guardian *ad litem*. When a minor is injured, two causes of action arise, one in favor of the minor for pain and suffering and permanent injury, the other in favor of the parents for loss of services during mi-

Mar. 1909]

Syllabus.

nority, or expenses of treatment. Bal. Code, § 4829 (P. C. § 257); *Hedrick v. Ilwaco R. & Nav. Co.*, 4 Wash. 400, 80 Pac. 714. These causes may be joined or tried in separate actions. They appear to have been properly tried in separate actions in this case.

The judgment is therefore affirmed.

RUDKIN, C. J., CROW, FULLERTON, CHADWICK, GOSE, and DUNBAR, JJ., concur.

[No. 7727. Decided March 27, 1909.]

SADIE TAUSICK, *Appellant*, v. EUGENE TAUSICK,
Respondent.¹

DIVORCE—VACATING JUDGMENT—ACTION TO VACATE—PLEADING—DEMURRER TO DEFENSES. In an action to set aside a divorce for fraud, a demurrer to the defense of laches in prosecuting the suit is properly overruled, although it may have been unnecessary to affirmatively plead it.

SAME—DEFENSES—LACHES—EVIDENCE. In an action to set aside a divorce obtained, as claimed, by the duress of threatened false charges of adultery, evidence of such adultery is properly admitted in defense of the action to show that the charges were not false, and that defendant had good grounds for divorce.

APPEAL—REVIEW—HARMLESS ERROR. Error in admitting evidence is harmless where the case is tried *de novo* on appeal.

DIVORCE—VACATING—ATTORNEY AND CLIENT—APPEARANCE—AUTHORITY. A decree of divorce, entered without service of process and upon defendant's appearance by attorney, will not be set aside for want of authority for the attorney to appear, where the defendant verified the answer and knew of the purpose of the suit and knew of the decree, and shortly after was apprised of her rights, and it appears that she only became dissatisfied later when the husband refused to carry out promises with reference to a settlement.

DIVORCE—VACATING—CANCELLATION OF SETTLEMENT—DURESS—EVIDENCE—SUFFICIENCY. The dismissal of an action to set aside a settlement between the parties to a divorce and the deed made by the wife, for alleged fraud and duress by false charges of adultery, is

¹Reported in 100 Pac. 757.

sustained where it appears that she had the property settlement under consideration for some time, knew the character of the property and contents and effect of the deed, which she finally acknowledged, after first protesting she did not do so "freely and voluntarily" and where she acquiesced in the settlement for some two years after being advised as to her rights by an attorney, and there was evidence warranting the husband's belief in the charges which he made, and for which he divorced her.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered May 25, 1908, in favor of the defendant, dismissing, after a trial on the merits, an action to set aside a divorce on the ground of fraud, and to declare a trust. Affirmed.

Cary M. Rader and Elihu F. Barker, for appellant.

T. P. & C. C. Gose, for respondent.

CHADWICK, J.—This action was begun May 9, 1907, by Sadie Tausick, to set aside a decree of divorce, rendered in favor of Eugene Tausick on the 28th day of February, 1903, and to declare a trust in the property now in defendant's name. The case went to trial on the merits, and a decree was entered dismissing the complaint. Plaintiff has appealed.

She makes the following assignments of error: That the court erred in overruling the demurrer to the third and fourth paragraphs of the answer and affirmative defense; the court erred in admitting evidence of adultery on the part of appellant; the court erred in dismissing the complaint of appellant; the court erred in refusing to enter judgment for the appellant. The pleadings are of necessity drawn out to a great length, but the issues are sharply drawn. Appellant must recover, if at all, upon the theory that in the divorce proceedings she was not a voluntary agent, but was coerced and by fraud and duress induced to sign away her rights in the property then standing in the name of her husband, and to file an answer admitting the allegations of her husband's complaint, in which she asked no affirmative relief. She alleges, that the coercion and duress consisted in false

Mar. 1909]

Opinion Per CHADWICK, J.

charges of adultery; that her husband threatened if she did not consent to a divorce and division of the property upon terms fixed by him, that he would file a complaint charging her with adultery, and sustain it by the testimony of certain witnesses whom he had employed to obtain evidence against her. It is further alleged that he coerced her by charging that she had conspired with his bookkeeper to rob him. She says that all of these charges were untrue, but because of her then weakened physical condition and mental distress, she lacked sufficient strength to assert and defend her rights.

A divorce was obtained on the grounds of mutual dislike, incompatibility of temper, and such difference in tastes and habits as made the one spouse burdensome to the other. The record in the divorce proceeding shows that she was represented by an attorney who has since died. No service of summons was made upon her, and she was not present at the trial, and she now says that the divorce was obtained without her knowledge, and that the attorney of record appeared without her authority. About that time, either the day after as testified to by respondent, or within about two weeks as testified to by appellant, respondent gave to appellant a certificate of deposit for the sum of \$2,000, and also about \$200 in money. He claims to have since given appellant enough money to aggregate the sum of \$3,150. The largest amount given her at one time was the sum of \$500, to enable her to make final payment upon a cottage which she was purchasing for her own use. He also testified that he gave her about \$850 in household goods and personal property. He also gave her money to meet the expenses of two or three summer trips to the ocean beach. Appellant's position is somewhat anomalous. It is not quite certain whether the theory of her complaint that the court did not acquire jurisdiction and that she was coerced into signing the deed to respondent's property, or the theory that runs in and out of her testimony for its whole length that she settled with respondent and allowed him to take a divorce upon the understanding

that he would do the right thing by her in the way of a property settlement and future advances which he has failed to keep, is the one upon which she most relies. However that may be, we shall address ourselves to the assignments of error in their proper order.

We are of the opinion that no error was committed in overruling the demurrer to the third and fourth paragraphs of the affirmative defense (numbered 3 as we shall assume, although they are not specified in the assignments of error). These paragraphs charge appellant with laches in the prosecution of her remedy, if she has one, and were properly pleaded, although possibly unnecessarily so. We think the court committed no error in admitting evidence of adultery. Appellant had alleged in her complaint that respondent had charged her with adultery and that such charge was false, but nevertheless, because of her mental and physical distress, she had yielded to his demand and had consented to the divorce, and to signing away her right in the property. Respondent was therefore warranted in offering evidence to show that, from his point of view at least, the charge was not false, and that he had lawful grounds upon which to prosecute an action. The view we take of this case makes the assignments of error already noticed immaterial. The case is here *de novo*, and the true merit of the case can be tried without reference to them.

The position taken by appellant, that the court was without jurisdiction in that the appearance made by the attorney Cavanaugh was made without authority and was therefore not binding upon her, should be first determined. Many cases are cited to sustain the proposition that an attorney appearing for another without authority gives the court no jurisdiction over the party he assumes to represent. Had this case come to us upon an order sustaining the demurrer to the complaint, we would have hesitated before deciding that the demurrer was not well taken. Indeed, it is most likely that the complaint itself shows that the court had jurisdiction

Mar. 1909]

Opinion Per CHADWICK, J.

of the defendant. But inasmuch as the trial court treated the complaint as sufficient and tried out the issue, we shall assume that it states a cause of action. But the facts, in our judgment, do not bear out appellant in her contention. She knew that her husband had set about to get a divorce. Whether the attorney was selected by her or by him is a disputed proposition. But after several days' consideration, she signed the verification to the answer, the contents of which she knew, and the purpose of which she probably knew. If not, the law will charge her with such knowledge. The standing of the attorney is not shown to be such as to warrant the court in presuming even that he was a party to a most detestable fraud on appellant. The fact that she did not know that the case was tried at the time it was tried, and was not present, can make no difference. Her answer was such that her presence could have added nothing to the formality of the proceedings or to the information of the court. She knew of the decree in the divorce case; if not immediately, very soon after it was rendered, and some time after that she consulted with attorneys, at least two of them, and must have been apprised of her legal rights. Aside from this, her testimony taken as a whole does not bear out her complaint. It indicates to our mind that her dissatisfaction comes, not so much from the unauthorized appearance of her attorney, as from the fact that she believes her husband has not carried out his promise with reference to the settlement of money upon her after the decree was rendered. In other words, if respondent had met her demand subsequently made, the question of jurisdiction would have been admitted. A circumstance very like the present one was a factor in the case of *Turner v. Turner*, 33 Wash. 118, 74 Pac. 55. In considering the relation of the attorney whose authority was disputed the court said:

"She admitted that he held a retainer from her, and was looking after her legal business in Spokane, and that she had consulted with him concerning the probabilities of such

a suit, but she is positive in her assertion that she never authorized him to appear in the proceeding or waive the service of process upon her. There are circumstances shown by the record, however, which appear to put her memory at fault. The attorney who purported to represent her was an able and distinguished lawyer, who had enjoyed a large and varied practice, and who knew well the effect upon the judgment had his appearance in the proceedings not been authorized. He died just prior to the trial, and we have not the benefit of his testimony, but his letters to the appellant, written just before and just after the decree, are in the record."

While there are no letters or other written evidence here as there was in that case, the conduct of the attorney is in evidence before this court, and his acts being unchallenged during his lifetime, we are convinced that appellant is mistaken in the fact or the legal consequences of her then situation. We conclude that the court had jurisdiction and that the decree in the divorce case was properly entered.

The remaining question is whether appellant signed the deed to respondent in settlement of their property rights, of her own free will and without duress on the part of her husband. Without entering into an extended discussion of the testimony, we think there is abundant evidence to sustain the finding of the lower court, and that her complaint was properly dismissed. She had the matter of property settlement under consideration for some time. She knew that the character of the property, whether community or separate, was an item in dispute. She knew the contents of the deed, as well as its legal effect. It is not shown that respondent in any way undertook to prevent appellant from fully informing herself with regard to the property and her right to share in it. *Morgan v. Morgan*, 10 Wash. 99, 38 Pac. 1054. The deed which she signed was prepared by Mr. Thomas Dovell, attorney for respondent, and was signed by the appellant in his office, and in his presence, and in presence of Mr. Otto B. Rupp, an attorney of standing at the bar of Walla Walla county, who had no interest in the case. Both

Mar. 1909]

Opinion Per CHADWICK, J.

of these gentlemen testified that the deed was voluntarily signed by appellant, Mr. Dovell saying:

"Mrs. Tausick came to my office for the purpose of executing a deed and, I think, a bill of sale of real estate and personal property to Mr. Tausick. She came into the office. I had the instruments prepared. My recollection is not distinct as to everything which occurred. I can only detail it now as I can recollect, although as to some things I have a very distinct recollection. I had the instruments prepared, but I would not say that I read them to Mrs. Tausick or that I gave them to her to read; I don't know which. I remember, however, saying to her, asking her if she understood that these were instruments which divested her of any community interest that she might have in Mr. Tausick's property, and she said that she understood that. If I didn't give them to her to read or didn't read them to her, I am pretty sure I gave her abundant opportunity to read them. I asked her to sign them, and she signed them. I then asked her if she acknowledged that she executed these instruments freely and voluntarily and for the uses and purposes mentioned in the instruments. I say that I used that expression to her because I always do when I take an acknowledgment. Just what she said in reply, I am not prepared to say exactly. There was some demurrer. My present recollection of it would be that she said that she executed them freely and voluntarily, but did not consent to them or did not want to consent to them, or something of that kind. Just as soon as she said that, I said to her: 'I can take no acknowledgment in that way.' I have quite a distinct recollection that a few words passed between us. I think, probably, I said to her that there was no difference between saying that you execute anything freely and voluntarily and consenting to it. There was certainly no more than a very few words passed between us, and I stepped out of the room into another room and left her there. A little later, a few minutes later, she indicated to me in some way (by sending some one to call me or by calling me herself) that she was ready to acknowledge these instruments. I came into the room. I again asked her if she acknowledged that she executed these instruments freely and voluntarily and for the uses and purposes mentioned in them, and she said she did. I then appended my acknowledgment to them, and she left, and that was all there was to it.

Q. Did you observe whether she was enjoying apparently good health at that time, or whether she was ill? A. She was apparently in good health at that time."

Mr. Rupp remembered the incident of signing the deed as follows:

"I was present in his office some time between the 14th day of January, 1903, and the first day of April, that year, at which he took an acknowledgment to a deed which Mrs. Tausick signed and acknowledged at that time. I cannot tell you what the exact date was. Q. You may now state to the court just what was said and done by Mrs. Tausick and Mr. Dovell at the time the acknowledgment was taken. A. At the time this transaction took place, I was reading law at Mr. Dovell's office. It consisted of three rooms, an entrance room which you might describe as the northwest room, a room to the east of it occupied as a private office, and a room to the south. I was in the south room alone reading. Mr. Dovell and Mrs. Tausick came in that room, and I immediately got up from my seat to give Mrs. Tausick the chair, and started to leave the room. While I have no independent recollection of Mr. Dovell's requesting me to remain, yet I know he did so or I would have left the room. A paper was placed before Mrs. Tausick. I think Mr. Dovell brought the paper in with him, probably. Mrs. Tausick took the seat I had vacated and apparently read over the paper. She was at least given ample time and opportunity to do so. While Mr. Dovell and I remained standing and when she had read the paper over, or had apparently read it over, he said something to her (the exact language I cannot now remember) but I think he said this: 'You understand, Mrs. Tausick, do you, that this is a deed which divests you of all right, title or interest to the real estate described in it, and you sign and execute the same freely and voluntarily?' Mrs. Tausick at once replied and said: 'Why, no, Mr. Dovell, I do not.' As to what took place from that time on I do not exactly remember. I do remember this, however: Mrs. Tausick insisted that she consented to the signing of the deed, but insisted that she did not do it freely and voluntarily. I may say that I was somewhat perplexed and surprised by her distinction between the two, and apparently Mr. Dovell was equally so. Some debate took place between them. He could

Mar. 1909]

Opinion Per CHADWICK, J.

not understand, if she consented to it, why she did not do it freely and voluntarily, and after a conversation along on the distinction that she was apparently trying to make between consenting to it and doing it freely and voluntarily, she even said she was willing to do it, but not freely and voluntarily. Mrs. Tausick, however, subsequently said that she did it freely and voluntarily, and Mr. Dovell at that time repeated her language, or said something like this: 'You do then sign this deed and acknowledge it freely and voluntarily for the purposes set out in the deed,' and Mrs. Tausick replied: 'I do.'"

Appellant herself narrates the occurrence at Mr. Dovell's office as follows:

"Q. Did you find Mr. Dovell in the office? A. Yes, sir; I think he was there; if he wasn't, he came in in a few minutes. Q. Do you remember any one else being in the office? A. Yes, sir. Q. Who? A. Otto Rupp. Q. What did Mr. Dovell say and do when you arrived at the office? A. He said he had a paper for me to sign and handed it to me. Q. Did you sit down at the desk or table? A. Yes, sir. Q. And he handed you the instrument? A. Yes, sir. Q. Did you read it? A. I read part of it; but I was so nervous that I didn't go over all of it; I didn't read all of it. Q. Did you sign it? A. Yes, sir; I did. Q. Did any conversation occur then between you and Mr. Dovell? A. Yes, sir. Q. What was said and done? A. He asked me if I signed that of my own free will, and I told him, I said: 'No, Mr. Dovell, you know that I do not; you know that I do it under compulsion.' Q. Was Mr. Rupp or any one present at that conversation? A. Yes; I am sure that Mr. Rupp was there all the time. Q. Did you have any further conversation with Mr. Dovell then and there? A. Well, he talked to me about signing; and finally I told him that I consented to sign it, and I came very near tearing the papers all to pieces then."

In cross-examination she said:

"Q. Did you say that you never told Mr. Dovell that you signed that deed freely and voluntarily? A. No, sir; I told him that I consented to sign it. Q. Did Mr. Dovell ask you if you signed that deed by using the words that appeared in the acknowledgment? Didn't he, Mrs. Tausick, didn't he

repeat right from the acknowledgment the formal words in the acknowledgment, when he asked you first about the deed? A. He asked me if I signed it of my own free will; he may have used those exact words. Q. 'Freely' and 'voluntarily'? A. Yes, sir; I think that was what was used; and I said: 'Mr. Dovell, you know that I do not.' Q. Did he tell you that he could not take your acknowledgment to the deed unless you did say so? A. Well, not exactly; he talked to me a little bit, and said that it was the best thing I could do, or something to that effect, for I would eventually have to do it. Q. He told you that you would eventually have to do it? A. Yes; sir; to that effect. Q. And that you had better sign it? A. He advised me to sign it. Q. Did he urge you in any way to sign it? A. Well, I can't say—in a way, he did; he said that Mr. Tausick would do whatever he had said he would. Q. That Mr. Tausick would keep his agreement with you? A. Yes, sir. . . . Q. Did you think that you still retained a half interest in it when you signed it? A. I understood that I was to have my share of the property in money. Mr. Tausick said that he could take care of the business better; and, if the deed was made over to him, it would save the bother of him coming to me about that."

The last answer is but one of many that, when taken in connection with her subsequent conduct, indicate that it was her understanding that the property was to be deeded over to her husband absolutely. The fact that she accepted the \$2,000 certificate of deposit without protest, and the tenor of the several letters written by her to respondent, asking for accommodations in the way of money, all go to show that she was not proceeding upon the theory that she had any interest in the property of respondent. On the 27th day of November, 1905, well on to two years after the divorce was granted and after she had consulted with Mr. Sharpstein, an attorney at the bar of Walla Walla county, who had, according to her own testimony, advised her with reference to her probable rights, she wrote the following letter to respondent:

"Walla Walla, 11-27-05.

"Dear Mr. Tausick.—I have waited over a week thinking you would come up every day—of course I know you do

Mar. 1909]

Opinion Per CHADWICK, J.

not want to see me—neither is it pleasant for me—but I am so uncomfortable here and it seems to me you would surely not begrudge me a little home of my own when you have so much and me nothing. I have found a little house of 5 rooms already built that is just what I would like to have but as you know I cannot get it without your help—I can almost make my expenses could quite if I did not have rent to pay. You certainly know it is not pleasant for me to ask anything of you and I never will again if you will help me in this. Will you not let me know now what you will and will not do. Yours sincerely, Sadie.”

Respondent had been informed of certain indiscreet conduct on the part of his wife. He believed that she had been unfaithful to him. We shall not go into the details of this testimony, or determine her guilt or innocence. It is enough to say that the testimony convinces us that he believed the charges to be true, and because of this belief he severed all marital relations with his wife. The testimony shows that he fully informed appellant of his reasons for divorcing her, and whether innocent or guilty, she admitted her presence with others and under such circumstances as might well be calculated to impress the doubting, jealous mind as “confirmations strong as proofs of Holy Writ.” The testimony shows further that the separation was mutual; that they undertook to finally settle their property rights; that practically all of the property was owned by the respondent at the time of his marriage; and that she had ample time to consider the justice of the settlement before signing the deed. Finding these facts in the record, we cannot now say, although it should appear that the settlement was to a degree improvident on the part of appellant, that the contract of the parties should be broken and a new contract made for them, to cure the dissatisfaction of one of those concerned. Mere inadequacy of consideration is not enough to avoid a contract entered into between parties of mature judgment, nor can one who claims to have been overreached invite the review of a court of equity unless the inadequacy of consid-

eration is so great that a presumption of fraud follows the recital of the transaction. We are not prepared to say that appellant agreed to take less than was her just due. The lower court was warranted in dismissing this action upon the authority of the following cases decided by this court: *Turner v. Turner, supra*; *Morgan v. Morgan*, 10 Wash. 99, 38 Pac. 1054; *Long v. Long*, 38 Wash. 218, 80 Pac. 432; *Peyton v. Peyton*, 28 Wash. 278, 68 Pac. 757; *Ferry v. Ferry*, 9 Wash. 239, 37 Pac. 431; *Wickham v. Sprague*, 18 Wash. 466, 51 Pac. 1055; *Chezum v. Claypool*, 22 Wash. 498, 61 Pac. 157, 79 Am. St. 955.

The judgment of the lower court is affirmed.

RUDKIN, C. J., FULLERTON, MOUNT, DUNBAR, and CROW, JJ., concur.

GOSE, J., took on part.

[No. 7738. Decided March 27, 1909.]

*In the Matter of the Application of FRED MILECKE for a Writ of Habeas Corpus.*¹

HABEAS CORPUS—WARRANT—SUFFICIENCY—REMEDY BY APPEAL. The sufficiency of a warrant will not be inquired into upon an application for a writ of habeas corpus to release a prisoner held thereunder, the remedy being by appeal.

CONSTITUTIONAL LAW—IMPRISONMENT FOR DEBT—FRAUDULENT CONTRACTION OF BILLS—INNKEEPERS—STATUTE—CONSTRUCTION. LAWS 1903, p. 244, making it a misdemeanor punishable by imprisonment for any person to fraudulently incur an innkeepers', boarding or lodging house bill or secure accommodations by false pretenses without paying for the same, or to surreptitiously remove baggage without such payment, does not violate Const., art. 1, § 17, prohibiting imprisonment for debt except in the case of absconding debtors; since the imprisonment is for the fraud committed.

CONSTITUTIONAL LAW—IMPRISONMENT FOR DEBT. "Debt" within the meaning of the constitutional provision that there shall be no imprisonment for debt refers to contract obligations and not to obligations arising from fraud or in tort.

¹Reported in 100 Pac. 743.

Mar. 1909]

Opinion Per CHADWICK, J.

CONSTITUTIONAL LAW—ENCROACHMENT ON JUDICIARY—RULE OF EVIDENCE. LAWS 1903, p. 244, § 2, providing that refusing or neglecting to pay a bill, or surreptitiously removing baggage, shall be *prima facie* evidence of intent to defraud in contracting an inn-keeper's bill, is not unconstitutional; as the legislature may prescribe the *quantum* and order of proof.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered July 29, 1908, denying an application for a writ of *habeas corpus* for the release of a prisoner. Affirmed.

Swanson & Ripley, for appellant.

R. M. Barnhart and Donald F. Kizer, for respondent.

CHADWICK, J.—The petitioner was arrested and charged, in the police court of the city of Spokane, with having violated the provisions of chapter 131, LAWS 1903, p. 244, entitled: "An act for the protection of hotel, boarding house, restaurant, and lodging house keepers, and providing a penalty." Upon conviction he applied for a writ of *habeas corpus* in the superior court of Spokane county. This appeal is prosecuted from an order denying the writ.

Error is assigned in that the statute is unconstitutional and the conviction was unwarranted, and for the reason that the warrant did not state facts sufficient to justify the arrest of appellant. Before addressing ourselves to the first and more important assignment, we will dispose of the objection to the sufficiency of the warrant. This court has repeatedly held that the sufficiency of a warrant issued by a court of competent jurisdiction will not be inquired into upon an application for a writ of *habeas corpus*. The remedy of petitioner is by an appeal from the final judgment, and is ample for his protection. *In re Casey*, 27 Wash. 686, 68 Pac. 185; *In re Barbee*, 19 Wash. 306, 53 Pac. 155; *In re Nolan*, 21 Wash. 395, 58 Pac. 222. To the same effect: *State ex rel. Miller v. Superior Court*, 40 Wash. 555, 82 Pac. 875, 111 Am. St. 925, 2 L. R. A. (N. S.) 395; *State ex rel. Martin v.*

Hinkle, 47 Wash. 156, 91 Pac. 640; *State ex rel. McCalley v. Superior Court*, 51 Wash. 572, 99 Pac. 740.

The only question open for our consideration is the constitutionality of the law. That part of the act upon which the conviction of appellant must depend is as follows:

"A person who obtains any food, lodging or accommodation at a hotel, boarding house, restaurant, or lodging house, without paying therefor, or with intent to defraud the proprietor or manager thereof, or who obtains credit at a hotel, boarding house, or lodging house by the use of false pretense, or who after obtaining board, lodging or accommodations at a hotel, boarding house, restaurant, or lodging house, absconds or surreptitiously removes his baggage therefrom without paying for his food, lodging or accommodation, is guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not less than ten dollars nor more than fifty dollars, or imprisonment in the county jail not less than ten nor more than thirty days." Laws 1903, page 244, § 1.

It is urged that, under the guise of a penal statute, it provides for imprisonment for debt, in contravention of § 17, art. 1, of the constitution, and that it grants privileges to a class which upon the same terms do not belong to all citizens, in violation of § 12, art. 1. Similar statutes have been construed by the courts of several of the states: *Ex parte King*, 102 Ala. 182, 15 South. 524; *Chauncey v. State*, 130 Ala. 71, 30 South. 403, 89 Am. St. 71; *State v. Yardley*, 95 Tenn. 546, 32 S. W. 481, 34 L. R. A. 656; *Hutchinson v. Davis*, 58 Ill. App. 358; *State v. Benson*, 28 Minn. 424, 10 N. W. 471; *State v. Engle*, 156 Ind. 339, 58 N. E. 698.

Counsel insists, however, that the constitutional provisions in all the states passing upon this question, with the exception of Alabama, differ from our own, in that they provide that the legislature shall make no law authorizing imprisonment for debt in civil cases except in a case of fraud; whereas the constitution of this state makes no mention of the word "fraud," but limits the power of the legislature to providing for the imprisonment of absconding debtors. It is insisted

Mar. 1909]

Opinion Per CHADWICK, J.

that under the one form of expression, imprisonment may be authorized if there be fraud in the inception of the debt; in the other (Washington) it can only be authorized in the case of an absconding debtor. Imprisonment for debt is abhorrent to the spirit of free government, and is not to be tolerated under the form of penal statutes. That no man shall oppress his debtor or restrain him of his liberty has come to be a fixed principle, cherished by the people, and so guarded by constitutional provisions that the legislature cannot give ear to those who seek to use the power of the state to coerce the payment of their debts. Did we believe the statute under consideration was thus offensive, we would declare it unconstitutional without hesitation. But the solemn enactments of the legislative body are not to be ruthlessly stricken down. It is the duty of the court to sustain them if possible. It is only when they are clearly in opposition to the fundamental law that the judgment of the court will intervene, and not then to nullify a law that seems unjust, but rather to preserve the declaration of right reserved and made immune from legislative interference by the people themselves. We cannot read the statute as does counsel for appellant. It does not in our judgment warrant imprisonment for a debt. It would be beyond our province to hold that a person could be imprisoned for a simple contract debt; or, to put it in the way of counsel for appellant, simply because he did not pay his hotel bill. The hotel keeper, if he should undertake to use the law as a whip to compel the payment of an overdue account honestly contracted, would himself be subjected to the penalties of the law, and become liable for damages in a civil action. The law under consideration goes no further than to say that the fraudulent incurring of a debt is a crime. Appellant has obtained a thing of value with intent to defraud. He is liable, as much so as is the one who by fraudulent pretense obtains the goods of a merchant or the money of a banker.

The use of the word "debt" in the discussion of this kind

of legislation has unfortunately raised an issue of law that is unwarranted. The fault of counsel's reasoning is in assuming that, because the fraud of the appellant resulted in a debt, he can find protection under § 17, art. 1, of the constitution. In construing this provision the word "debt" is confined to an obligation arising out of a contract, express or implied. It is never extended to cover a tort,

"A person who wilfully injures another in person, property, or character, is liable therefor in damages. In some sense he may be called the debtor of the party injured, and the sum due for the injury a debt. But he is in fact a wrongdoer, a trespasser, and does not come within the reason of the rule which exempts an honest man from imprisonment, because he is pecuniarily unable to pay what he promised to. For instance, a person who wrongfully beats his neighbor, kills his ox, or girdles his fruit trees ought not to be considered in the same category as an unfortunate debtor. He ought to be liable to arrest in action for damages by the party injured. Deny him this remedy, and in the majority of such cases it would amount to a denial of justice, and a deliberate repudiation and disregard of the injunction contained in section 10 of the same article—'every man shall have remedy by due course of law for injury done him in person, property or reputation.' It may be admitted that a penalty given by statute is technically a debt. It does not, however, arise upon contract, but by operation of law. It is imposed as a quasi punishment for the violation of law or the neglect or refusal to perform some duty to the public or individuals enjoined by law. Penalties are imposed in furtherance of some public policy, and as a means of securing obedience to law. Persons who incur them are either in morals or law, wrong-doers, and not simply unfortunate debtors unable to perform their pecuniary obligations. I do not think the constitutional provision prohibiting imprisonment for debt was intended to apply to or include such cases." *United States v. Walsh*, 1 Deady (U. S.) 281.

See, also, *Lee v. State*, 75 Ala. 29; *Ex parte Hardy*, 68 Ala. 303; *United States v. Walsh*, 1 Abb. (U. S.) 66, 71; *Bray v. State*, 140 Ala. 172, 37 South. 250.

The principle underlying this class of enactments is so

Mar. 1909]

Opinion Per CHADWICK, J.

thoroughly reasoned in the case of *State v. Yardley, supra*, that we feel warranted in adopting the expressions of that court as our own:

"The offense consists, not in the creation of a debt, nor in its nonpayment, but rather in the fraud through which credit may be procured or payment evaded. The latter, and not the former, is the thing for which punishment is to be inflicted. As well said by one of the attorneys for the state, the legislative intent was 'to punish the debtor for his fraud, and not for his debt.' Honest debtors are not within the act. It relates to those alone who shall intentionally pursue a certain course of fraudulent conduct; and that course of fraudulent conduct, intentionally pursued, constitutes the offense for which punishment is prescribed, and without which punishment will not be inflicted. Without intentional fraud no offense is committed, no penalty incurred. The intention of the legislature, as we get it from the words and the tenor of the act, was to authorize punishment, including imprisonment, not for debt, but alone for particular intentional frauds, whereby the offender may obtain the property of his victim, . . . for temporary use in case of lodging, and for absolute consumption in case of food, without compensation; or whereby, after obtaining such accommodations, he would defeat the landlord's lien upon his baggage. To our minds, this is not only a fair and reasonable construction of the act, but the most easy and natural one that can be given the language employed. The manifest object was to protect the property and the lien of the landlord against those persons who would, by intentional fraud, wrongfully use or consume the one or defeat the other; and, to make that protection effectual, the offender is subjected to punishment for his fraud, whether practiced in the wrongful use or consumption of the landlord's property or in the removal of his own property upon which the landlord has a lien. In either case the landlord has an interest in property, which the state, as a matter of public policy or of individual right, may well protect by the passage and enforcement of a penal statute such as that before us."

Nor do we think that that part of § 2 of the act, providing that if it be shown that a party has refused or neglected to pay for his accommodations, or has removed or

surreptitiously attempts to remove, his baggage, such showing shall be *prima facie* evidence of guilt, does violence to any constitutional provision. It is elementary that, when a crime is defined, the legislature may provide the quantum as well as the order of proof. It is not going beyond sound reason to say that, when a person asks for and receives accommodations at a hotel for which he does not pay, or if he undertakes to destroy the innkeeper's lien on his baggage, he should assume the burden of showing an honest intent. We are not without precedent to sustain us on this point. It is like unto the statute (Bal. Code, § 7105; P. C. § 1607) that puts upon one who is charged with an unlawful entry or an unlawful breaking and entry, the burden of explaining his conduct to the satisfaction of a jury, or suffering the presumption that his entry was actuated by a burglarious intent. In the case at bar appellant has at least done a wrong, and the reasoning employed in the case of *State v. Anderson*, 5 Wash. 350, 31 Pac. 969, is pertinent:

"The presumption provided for is not a conclusive one, and even without the aid of such legislation the jury would be justified in finding a criminal intent from the fact of the unlawful entry, if under all the circumstances surrounding the case such a presumption would be a reasonable one. It is the constitutional right of defendant to demand proof of his guilt before he shall be convicted of a crime, but it does not follow from such fact that it is beyond the power of the legislature to provide that a certain presumption may follow from the establishment of a fact, from which such presumption may follow as a reasonable conclusion."

See, also, *State v. Kyle*, 14 Wash. 550, 45 Pac. 147; *State v. Eubank*, 33 Wash. 293, 74 Pac. 378; *State v. Lawson*, 40 Wash. 455, 82 Pac. 750.

The point made by appellant, that the act creates special privileges, is not discussed in his brief, nor do we find any merit in it.

The judgment of the lower court is affirmed.

RUDKIN, C. J., FULLERTON, GOSE, DUNBAR, MOUNT, and CROW, JJ., concur.

Mar. 1909]

Opinion Per DUNBAR, J.

[No. 7784. Decided March 27, 1909.]

W. W. ZENT *et al.*, Respondents, v. E. D. GILSON, Sheriff of Adams County, Appellant.¹

FRAUDULENT CONVEYANCES—PREFERENCES. A debtor in falling circumstances can prefer a creditor by mortgaging all his property to the exclusion of other creditors.

FRAUDULENT CONVEYANCES—TRANSFER FOR FUTURE SERVICES OF ATTORNEY—ATTACHMENTS—PRIORITY OVER BILL OF SALE. Persons in the rightful possession of property, charged with the larceny thereof, may transfer the same to attorneys for services rendered and to be rendered in the defense of their persons and the property, to the extent of a reasonable fee, as against objection by prior creditors, and the same will not be held fraudulent as to such creditors subsequently levying attachments on the property, where the only question involved was as to the priority of the attachments over the bill of sale to the attorneys.

Appeal from a judgment of the superior court for Adams county, Kauffman, J., entered July 11, 1907, upon findings in favor of the plaintiffs, after a trial before the court without a jury, in an action for conversion. Affirmed.

Crow & Richardson and *C. W. Rathbun*, for appellant.

Martin & Wilson, for respondents.

DUNBAR, J.—In March, 1907, James Brown and B. W. Masters were arrested at Ritzville, by the sheriff of Adams county, upon a complaint sworn to by F. E. Woods, president of Woods Lumber Company, a corporation of the state of Idaho, charging them with the larceny of certain horses and other personal property. The said Woods Lumber Company also brought suit against Brown and Masters, and attached the property. Before the levy was made under the attachment, Brown and Masters executed a bill of sale of the same property to W. W. Zent and H. N. Martin, attorneys at law. They were employed to defend the charge of larceny, and also to prevent the extradition of said Brown

¹Reported in 100 Pac. 739.

and Masters to the state of Idaho. After securing the bill of sale and placing it on record, demand was made upon the sheriff for the property, which was turned over to the plaintiffs. Afterwards the Woods Lumber Company directed the defendant to seize the property. The demand for the same having been made, the respondents brought an action for the value thereof. The case was heard without a jury, and a judgment for the value of the property, in the sum of \$1,500, rendered in plaintiffs' favor. From this judgment this appeal has been taken.

Several assignments of error have been made, but it is conceded by the appellant that the sole question presented by the appeal is that of priority between the attachment under which the appellant holds the property, and the bill of sale made by Brown and Masters to the respondents. The appellant contends that the bill of sale is fraudulent and should not be allowed to stand against the attachment. There was no question as to the validity of the attachment, and it was admitted at the trial that the appellant held the property by virtue of the attachment. The question was raised by the offer of testimony showing that Brown and Masters had creditors in Idaho, and have no other property out of which the creditors could recover their claims.

The statement of the attorneys for the appellant, is that it is familiar law that a contract for future services is not a sufficient consideration for a transfer of property, when the effect of such conveyance deprives existing creditors of their right to subject the debtor's property to the payment of their claims; and quite a number of cases are cited to sustain this statement. An examination of these cases shows that most of them are cases where a creditor had conveyed all his property for the purpose of securing future support, and in the cases cited this was held to be a void conveyance as to bona fide creditors. The sixth case cited by appellant, viz., *Benedict, Hall & Co. v. Renfro Bros.*, 75 Ala. 121, 51 Am. Rep. 429, is a case involving only the question of whether a stock

Mar. 1909]

Opinion Per DUNBAR, J.

of merchandise, which is mortgaged, where the mortgagor is allowed either expressly or by necessary implication to retain possession with a reserved power of sale over the mortgaged property, is void as against creditors, and it would seem to us has no bearing on the question under discussion.

But it can readily be seen that a different principle would be involved in the disposition of property for future support where the whole lifetime of the grantor is involved, from that in a case where an emergency has arisen in which a party is compelled to act, as in the employment of attorneys to protect his rights in a criminal action. In this state it is established that a debtor in failing circumstances may mortgage his entire property to secure bona fide debts to some of his creditors, and leave the debts due to other creditors unsatisfied. *Turner v. Iowa Nat. Bank*, 2 Wash. 192, 26 Pac. 256; *Vietor v. Glover*, 17 Wash. 37, 48 Pac. 788, 40 L. R. A. 297; *McAvoy v. Jennings*, 44 Wash. 79, 87 Pac. 53.

But, outside of this general proposition, the authorities seem to be uniform in sustaining the right of a debtor to convey his property to an attorney for legal services already rendered and to be rendered. In *Morrell v. Miller*, 28 Ore. 354, 43 Pac. 490, 45 Pac. 246, a case decided by the supreme court of the state of Oregon, and a case which is ably and extensively presented, it was held that the conveyance of Miller to his attorneys was not void. This seemed to be an extreme case, as will be shown by the following excerpt from the opinion:

"Miller was under arrest for a grave offense, then thought to be more serious than it afterwards proved to be, he being apprehensive that Morrell would die of the wound received at his hands. He had incurred a civil liability to Morrell because of the assault made upon him, and had previously transferred all of his property, of the aggregate value of five thousand five hundred and eight-five dollars and sixty cents, to Lord, for the purpose of securing his fees for services as

an attorney, with a declaration of trust that the balance should be disposed of as he and Lord should agree. At the time of the execution of these deeds, Morrell was a creditor of Miller. . . . This being so, the plaintiff claims that the latter deed was fraudulent as to him as well as the first. There are some attendant *indicia* of fraud, such as the transfer of all of Miller's property of such considerable value to Lord; the declaration of a secret trust in connection therewith; and the inadequacy of consideration for the second deed. But, upon the other hand, Miller was deeply interested. He was in the toils of the law, charged with a grave offense, and his object was to extricate himself therefrom. The purpose of making such use of his property as to secure able counsel to conduct his defense, and to attend to other apprehended litigation, was perfectly legitimate. His right to be heard by counsel is a constitutional right, and he should be permitted, unless hindered by legal process, the free and untrammelled use of his property to obtain legal assistance, otherwise constitutional privileges would be invaded. Upon the whole, we believe the second deed was intended to be and operated as an absolute conveyance of the title to said premises, and we are unable to say from the evidence that it is fraudulent and void as to creditors."

The court, however, allowed the conveyance to stand only as security for the legal services, agreed upon between Miller and Lord and Mays and the firm of McGinn, Sears & Simon.

This case was cited with approval in *Farmers' & Merchants' Nat. Bank v. Mosher*, 63 Neb. 130, 88 N. W. 552, where it was held that an insolvent debtor had a right to employ attorneys to defend his estate and himself, and to transfer his property for that purpose, provided it was done in good faith and the property transferred did not exceed a reasonable fee for his services. The same rule is announced in *In re Disbarment of Luce*, 83 Cal. 303, 23 Pac. 350; *Cortland Wagon Co. v. Gordy*, 98 Ga. 527, 25 S. E. 574; *Drucker v. Wellhouse*, 82 Ga. 129, 8 S. E. 40, 2 L. R. A. 328; *In re Parsons*, 150 Mass. 343, 23 N. E. 50; and in fact there are no cases to the contrary that we have been able to find, when

Mar. 1909]

Statement of Case.

applied to a conveyance for the purpose of securing attorney's fees.

So far as the question of future benefits is concerned, there are few transactions which do not contain an element of future benefits. As a rule, nothing is sold the proceeds of which are immediately absorbed in benefits, and it is not unreasonable to confer the right to a litigant who is in the rightful possession of property to use such property for the purpose of securing his legal rights. There being no question of fraud in this case, and it not being urged that the amount of attorney's fees claimed was not commensurate with the services rendered and to be rendered, the judgment of the court will be affirmed.

RUDKIN, C. J., MOUNT, CHADWICK, FULLERTON, and GOSE, JJ., concur.

[No. 7467. Decided March 29, 1909.]

FRANK W. OSBORNE *et al.*, *Appellants*, v. THE CITY OF SEATTLE *et al.*, *Respondents*.¹

DEDICATION—PLATS—ESTABLISHMENT OF STREETS—INTENT OF PLATTOB—EVIDENCE—SUFFICIENCY. Where an unknown meander line cut northeasterly across a plat, leaving unplatted triangular parcels between the meander line and the north and west sides of blocks at the outer edge of the plat, dedicated streets extend to the meander line along the sides of the outside blocks, which would otherwise have no street frontage for access, although there are no lines defining the opposite street boundaries; especially where such street extensions were staked out on the ground and not assessed for taxation.

Appeal from a judgment of the superior court for King county, Albertson, J., entered December 6, 1907, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action to restrain a city from improving a strip of land as streets. Affirmed.

¹Reported in 100 Pac. 850.

McClure & McClure, for appellants.

James E. Bradford and Scott Calhoun, for respondents.

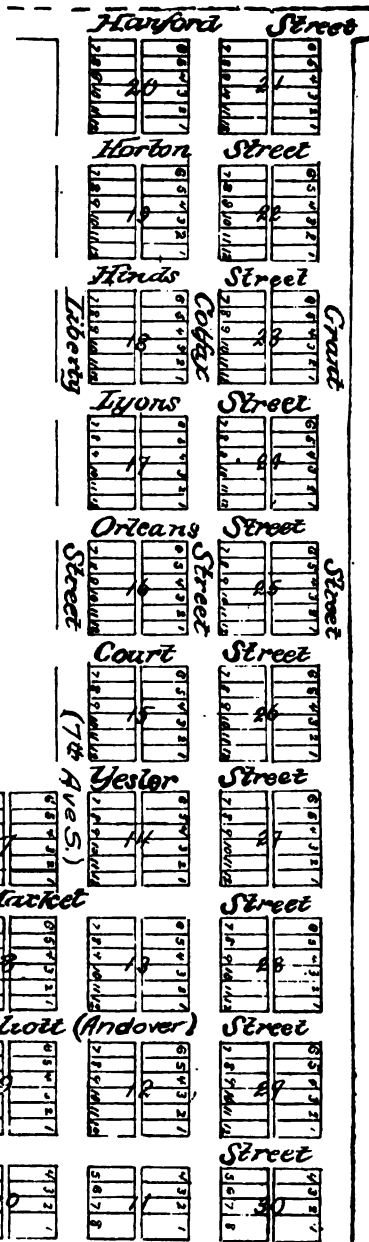
MOUNT, J.—This action was brought by the plaintiffs to restrain the city of Seattle from improving as streets a strip of land eighty feet in width to the west of block 6, and, also, a strip of land eighty feet in width north of block 2, as shown on the accompanying plat.

The plaintiffs claim a triangular piece of ground to the west of block 6 and north of block 2, by mesne conveyances from the patentees of the United States. The defendants claim that Government street extends north, eighty feet in width, to the west side of block 6, and that Elliott street extends west, eighty feet in width, on the north side of block 2. The question in the case is whether Government street extends further north than the north line of blocks 2 and 5, and whether Elliott street extends west further than the west line of blocks 5 and 6. On the trial of the case to the court without a jury, the court found:

“That there now exists, and during all the times in these findings mentioned there have existed, lawful highways or public streets eighty feet in width and embracing within the limits and boundaries thereof all of the property above described, which said highways and public streets were at all the times herein mentioned, and now are, for the use and travel of the city of Seattle and the public generally. That all of the property herein described, of which plaintiffs alleged they are the owners, lies wholly within and upon the limits and boundaries of Andover street (formerly Elliott street) and Sixth Avenue South (formerly Government street), as located and designated on and by said plat, and as actually dedicated and as actually laid out upon the ground, and that said plaintiffs and each of them are without any right, title or interest whatsoever therein or thereto.”

From this finding a judgment followed, dismissing the action. The plaintiffs appeal.

While several errors are assigned, the case necessarily turns on the finding above copied. The facts are as follows:



Plan of

SOUTH SEATTLE.

Streets 80 ft wide 16 ft.

Lots 40 by 250

Fractional Lots 76 1/2 and 9 in Blocks

No. 2-3-4-10-11-12-13-14-15-16-17-18-19-20

Block 100 Block 101 Block 102

Remitted to the City of Seattle

7-1

On April 16, 1869, Catherine Ott, who was the owner of the land, caused to be recorded in the auditor's office of King county the "Plan of South Seattle," which is copied above. It is admitted that this platted land lies wholly within the limits of the John J. Moss Donation claim, excepting where the blocks projecting to the northwesterly cross the meander line of that claim. This meander line, which became under the state constitution the boundary line of the claim, cut off a small fraction of lot 5, block 1, and running thence northeasterly cut off the extreme northwesterly corner of lot 7, block 2, and a small fraction of lot 7 in block 6, and also a fraction of lot 7 in block 7. The meander line is not shown on the plat. The lots, blocks, and streets along this meander line are tide lands, part of the time under water, and when not under water are mud flats. After the plat was filed and recorded, lots and blocks were sold by reference to it. Thereafter the names of certain streets shown upon the plat were changed by city ordinances, as follows: Government street was changed to Sixth avenue south; Sansome street to Maynard avenue; Liberty street to Seventh avenue south, and Elliott street to Andover street. When the land was surveyed for platting, the streets were run to conform to the streets already existing in plats on the north and west of the tract, and the streets were staked out upon the ground eighty feet in width to the meander line. Since the filing of the plat, the land in question has never been assessed for taxes or placed upon the tax rolls. The validity of the plat is admitted, and it is also admitted that whatever streets appear to have been dedicated by the plat are dedicated streets.

Appellants rely largely upon the case of *Columbia & Puget Sound R. Co. v. Seattle*, 33 Wash. 513, 74 Pac. 670, for a reversal of this case. In that case the dispute arose over a strip of land thirteen and one-half feet in width, lying to the west of block 1, lot 2, of Maynard's plat of Seattle. The city claimed the strip as a part of the street west of that lot. In that case lot 1 of block 2 was one of the extreme western

Mar. 1909]

Opinion Per MOUNT, J.

tier of lots as shown upon the plat. That plat as platted and also the strip in front of it were wholly within the line of Maynard's claim. No street was designated upon the plat to the west of this tier of lots. Under these facts, which are all stated in the opinion, it seems clear that the western line of the westernmost lots would be the limit of the dedication, and the fact that the streets running east and west were not closed by a line drawn across them would not indicate an intention of the dedicators to continue streets beyond the west line of the lots, and the fact that there was no designated street running north and south along the western tier of lots shows that there was no intention of the dedicator, in view of the statute, to dedicate a street there, even though the dedicator was the owner of a strip of land on the west of the plat sufficient for a street.

We think that case was correctly decided. But it does not necessarily control this, for several reasons. First, there was no street at all designated upon the west of the plat. The streets running east and west extended to the westernmost part of the plat and no further. In this case, streets are designated, and must extend to the extreme parts of the plat, or several of the lots will have no street frontage at all. For example, if Elliott street extends west only to the west line of blocks 5 and 6, and Government street extends north only to the north line of blocks 2 and 5, then lots 7, 8, 9, 10, and 11 of block 6 have no street frontage at all, and the only access would be through an alley sixteen feet wide. The same would be true of the same numbered lots in blocks 2 and 7, and lots 5, 6, 7, and 8 in block 1 would be altogether isolated with no means of access whatsoever. It is not to be supposed that land would be platted into lots and blocks without any means of access. Again, the evidence in this case shows that the streets were actually staked off upon the ground, and have always been considered streets, although not used by reason of their unimproved condition. And further, the fact that the land in question has never been assessed for taxation, in-

dicates that it has been held as public property both by the city and the original owner of the land.

Appellants also rely upon *Polson v. Aberdeen*, 44 Wash. 155, 87 Pac. 73, and *Meacham v. Seattle*, 45 Wash. 380, 88 Pac. 628. In the former case we held that the plat and the land as staked off controlled the platted land, and that the lands lying between the platted land and the river were not included within the plat; which is, in substance, the same as was held in *Columbia & Puget Sound R. Co. v. Seattle*, *supra*. In *Meacham v. Seattle*, we held that a street named upon a plat was a dedicated street, and intended as such even though the same was not within the land described as platted. These cases do not, in our opinion, control the case at bar. The controlling question in those cases was the intent of the parties who made the plats. This intention is gathered principally from the plat itself; though, when the plat is ambiguous or uncertain, surrounding circumstances and even extrinsic evidence may be considered for the purpose of determining the real intention of the platator. And this rule is recognized in each of the cases above named. The cases of *London & San Francisco Bank v. Oakland*, 90 Fed. 691; *Warden v. Blakley*, 32 Wis. 690, and *Hanson v. Eastman*, 21 Minn. 509, were cases almost exactly like the case at bar, and it was held in each of those cases that the streets were intended to extend along the platted lots, even though no marks were made upon the plats to indicate that intention. In the Wisconsin case the court said:

"We think it perfectly clear upon the face of the plat itself, . . . that Alice street extends along the south side of block 20. . . . But it is objected on the other side that if this was the intention of the proprietor he would have designated Alice street by a line south of block 20, as was done in reference to all streets upon the plat. But the circumstance, that there is no line there defining the boundary of that street, can have no such controlling effect. . . . Indeed, upon an examination of the plat itself, it seems impossible to arrive at any other conclusion than that it was

Mar. 1909]

Opinion Per MOUNT, J.

the intention of the original proprietor to have Alice street extend across Main street and along the south side of block 20."

Appellants seek to distinguish these cases by the fact that a line appeared upon the plats therein showing a triangular space, while in this case the meander line is omitted from the plat, leaving the triangular space a mere open space. We do not regard this as a distinction. While it is true that the meander line is not shown upon the plat, it is conceded that the plat extended to the meander line, and that the northwest corner of blocks 1, 2, 6, and 7 actually crossed this line by a few feet. It is clearly shown, however, that it was the intention to plat only to that line. While the line is not marked upon the plat, it is marked upon the ground, and its absence from the plat is of no special importance. Other questions are stated in the appellants' brief, but in view of the admission that the plat is a valid plat, we deem it unnecessary to consider questions which go to the validity of the plat.

We are satisfied from the record, for the reasons herein stated, that Government, or Sixth, street extends north at least to the meander line on the west side of block 6, and that Elliott, or Andover, street extends west on the north side of block 2 to the meander line at that point, and therefore, that the judgment of the lower court was right, and must be affirmed. It is so ordered.

RUDKIN, C. J., FULLERTON, DUNBAR, and CROW, JJ., concur.

CHADWICK, MORRIS, GOSE, and PARKER, JJ., took no part.

[No. 7695. Decided March '29, 1909.]

ZULA DAVIS, *Respondent*, v. CHARLES S. LEE *et al.*,
Appellants.¹

DEEDS—MERGER—VENDOR AND PURCHASER—CONTRACT TO SELL—CONSTRUCTION. There is an exception to the general rule that an accepted deed merges the contract between the parties, where the vendor had agreed in writing "to sell" the land and to convey by a quitclaim deed, and, after payment of the purchase price, it was found that he had no title.

APPEAL—REVIEW—HARMLESS ERROR. Where there is a trial *de novo* in the supreme court, error in the admission of evidence is harmless.

VENDOR AND PURCHASER—AGREEMENT "TO SELL" LAND—WARRANTY. An agreement "to sell" land is a contract to sell a title, and implies an engagement to make a good title, in the absence of a stipulation to the contrary.

SAME—CONTRACT "TO SELL"—STIPULATION FOR QUITCLAIM DEED—EFFECT—CONSTRUCTION. Where a contract for the sale of land stipulated that the vendor "will sell to" the vendees and that the vendees "will purchase" the land described, making time of the essence, and provided for a forfeiture in case of nonpayment, and that upon full payment and request, the vendor "shall make . . . a quitclaim deed to said premises," the vendor has obligated himself both "to sell" the land and to make the deed, and the execution of a quitclaim deed without having title to the land, does not absolve him from his obligation "to sell"; in which case the vendee can recover the purchase money paid.

SAME—CONTRACTS—CONSTRUCTION—ERASURE OF PRINTED FORMS. In such a case, the fact that in the printed form of contract, the words "a deed to said premises" were erased and "a quitclaim deed" substituted in ink, does not show an intent to limit the contract to the legal effect of a quitclaim deed; since there would be no inconsistency in the contract "to sell the premises," and since under a liberal rule of construction, a quitclaim in such case is in effect a bargain and sale deed or a "deed," and effectual under the statute to convey title.

PRINCIPAL AND AGENT—DISCLOSED AGENCY—LIABILITY OF AGENT TO THIRD PARTY. A real estate agent signing a contract to sell land on behalf of the owner, and transacting all the business as agent, is not liable for his principal's default on failing to convey a good title, where none of his acts were inconsistent with the relation of agency.

¹Reported in 100 Pac. 752.

Mar. 1909]

Citations of Counsel.

INTEREST—LEGAL RATE—MONEY PAID. Upon recovery of money paid on a contract to buy land, it is error to allow interest at a greater rate than the legal rate of six per cent.

Appeal from a judgment of the superior court for King county, Griffin, J., entered July 13, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to recover money paid under a contract to purchase land. Affirmed in part and reversed in part.

Fred H. Peterson, for appellants, contended, that the delivery and acceptance of the deed created a merger of the contract therein, and, the contract ceasing to legally exist, no action could be based thereon. 18 Cyc. 616; *Houghtaling v. Lewis*, 10 Johns. 297; *Thomas v. Barton*, 48 N. Y. 193; *Fritz v. McGill*, 31 Minn. 536, 18 N. W. 753; *Bryan v. Swain*, 56 Cal. 616; *Williams v. Hathaway*, 19 Pick. 387. The possession of the deed by the grantee raised a presumption of delivery and acceptance. *Lawson*, Presumptive Evidence, p. 491; *Branson v. Caruthers*, 49 Cal. 374. The written words "quitclaim deed to the premises" inserted in a contract partly printed will, in construing the contract, be held to express the intent of the parties thereto. *Daly v. Busk Tunnel R. Co.*, 129 Fed. 513. The contract being executed and the deed containing no covenants, no recovery can be had unless the action be based upon fraud or mistake. *Decker v. Schulze*, 11 Wash. 47, 39 Pac. 261, 48 Am. St. 858, 27 L. R. A. 335; *Wilde v. Gibson*, H. L. 1 Clark & Fin. (N. S.) 605; *Thompson v. Jackson*, 3 Rand. (Va.) 504, 15 Am. Dec. 721; *Woodruff v. Bunce*, 9 Paige Ch. (N. Y.) 443, 38 Am. Dec. 559; *Denston v. Morris*, 2 Edw. Ch. (N. Y.) 37; *English v. Thomasson*, 82 Ky. 280; 2 Warvelle, Vendors, 1104. Nor can the purchaser recover his money on the ground of failure of title, unless the deed contains covenants, or unless the grantor is guilty of fraud. *West Seattle Land & Imp. Co. v. Novelty Mill Co.*, 31 Wash. 435, 72 Pac. 69; *Union Pac. R. Co. v. Barnes*, 64 Fed. 80; *Botsford v. Wilson*,

75 Ill. 132. The judgment against the defendant Vernon was error, inasmuch as his agency was known to the plaintiff. *Wilson v. Wold*, 21 Wash. 398, 58 Pac. 223, 75 Am. St. 346.

W. F. Freudenberg, for respondent.

CHADWICK, J.—Prior to the 4th of May, 1903, defendant Charles S. Lee had acquired a tax title to the lands herein-after described. On that day he, as party of the first part, and D. P. Merritt and H. Merritt, as parties of the second part, entered into the following contract.

“REAL ESTATE CONTRACT.

“It is hereby mutually agreed, by and between Charles S. Lee, unmarried, of Ballard, Wash., the party of the first part, and Harry Merritt and D. P. Merritt, the parties of the second part, that said party of the first part will sell to said parties of the second part, their heirs and assigns, and said parties of the second part will purchase of said party of the first part, his heirs, executors or administrators, the following described lots, tracts or parcels of land, situate in King County, Washington: All of lots one (1) two (2) three (3) four (4) and five (5) in block seventy-two (72) in Salmon Bay Park Addition to the city of Seattle now in Ballard, with the appurtenances thereunto belonging, on the following terms:

“First, the purchase price for said land is two hundred fifty & no-100 dollars, of which the sum of twenty-five & no-100 dollars has this day been paid as earnest, the receipt whereof is hereby acknowledged by said party of the first part; and the further sum of two hundred twenty-five & no-100 dollars to be paid on or before the — day of —, A. D. 19—, with interest thereon from this date until paid at the rate of 8 per cent per annum, as follows, to wit: Ten & no-100 on the first day of each and every following month until fully paid, and the said parties of the second part, in consideration of the premises, hereby agree that they will regularly and seasonably pay all taxes and assessments which may be hereafter lawfully imposed on said premises. All improvements placed thereon shall remain, and shall not be removed before the final payment be made for said above described premises. In case the said parties of the second

Mar. 1909]

Opinion Per CHADWICK, J.

part, their legal representatives or assigns, shall pay the several sums of money aforesaid, punctually at the several times above specified, and shall strictly and literally perform all and singular the agreements and stipulations aforesaid, according to the true intent and tenor thereof, then the said party of the first part shall make to the said second party, his heirs or assigns, upon request, and upon surrender of this agreement, a quitclaim deed to said premises. But in case the second parties shall fail to make the payments as set forth in this agreement, or any of them punctually, and upon the terms and at the times specified, the times of payment being declared to be of the essence of this agreement, or permit any lien for labor or material to be filed against said real estate, then the party of the first part, his heirs, executors, or assigns, shall have the right to declare this agreement null and void, and in such case all the rights and interest of second parties hereby created or then existing shall utterly cease and determine, and the premises shall revert to and revest in said first party without any declaration of forfeiture or act of re-entry, and second parties shall have no right of reclamation or compensation for money paid or improvements made, as absolutely, fully and perfectly as if this agreement had never been made, and in such event such payments shall be retained by said party of the first part as compensation for the use and occupancy of said premises by said parties of the second part, and as rental thereof. And it is further agreed, that no assignment of this agreement shall be valid without the consent and signature of Charles S. Lee or W. H. Vernon, agent, the party of the first part. And the said second parties hereby agree to pay to said first party the remaining principal and interest as follows: . . . Payments to be made on or before the above dates to Charles S. Lee or W. H. Vernon, Agt., or order. Interest due, to be deducted from any payment made.

"Witness our hands and seals in duplicate, this 4th day of May, A. D. 1903.

"Charles S. Lee (Seal)

"D. P. Merritt (Seal)

"H. Merritt (Seal)

"Signed, sealed and delivered in presence of

"H. Galloway

"W. H. Vernon."

Thereafter the Merritts sold all right, title, and interest in the contract to Joseph I. Davis and Zula Davis, his wife, plaintiffs herein. All payments were made as stipulated, and a quitclaim deed was executed by defendant Lee on the 22d day of September, 1905, which was delivered to Mrs. Davis, but she denies that it was ever accepted as a discharge of defendants' contract. It was never recorded. Just prior to the last payment, plaintiffs were threatened with an action of ejectment. They notified defendant Vernon, who had acted throughout for defendant Lee, of the pendency of the action. When the action was brought, Lee was made a party to the suit. He thereupon served notice on plaintiffs that, if they did not immediately pay the balance due—a matter of \$17.10—he would forfeit the contract. Plaintiffs accordingly paid the amount, taking a receipt in full and a quitclaim deed. Lee did not defend the action of ejectment, but filed a disclaimer of any interest in the land, and was dismissed as a party. Plaintiffs assumed to defend the title, but were unsuccessful. After judgment against them, they purchased the property from the owner; whereupon they brought this action to recover the purchase price and the costs and expenses incurred in the action of ejectment. Pending the trial in the court below, plaintiff Joseph I. Davis died, and the action has since been prosecuted under the original title by Zula Davis, in accordance with the stipulation of the parties. The trial court found for the plaintiffs in the sum of \$250, the purchase price, with interest at the rate of ten per cent per annum, but denied a recovery for the costs and expenses incurred in defending their title.

Appellants assign numerous errors, but aside from a general assignment as to the admission of testimony, they all go to the one legal proposition, Did the appellant Lee perform his contract by the execution and delivery of a quitclaim deed? Appellants contend that, whatever the original contract may have been, and whatever agreements or assurances may have been given during the life of the contract, they were all

Mar. 1909]

Opinion Per CHADWICK, J.

merged in the deed, and by its acceptance appellants took only such title as Lee had, and are without remedy. We agree with counsel that the general rule is that "a deed made in full execution of a contract of sale of land merges the provisions of the contract therein, and this rule extends to and includes all prior negotiations and agreements leading up to the execution of the deed, all prior purposes, stipulations and oral agreements, all collateral promises, including promises made contemporaneously with the execution of the deed." Like most all rules, the one quoted has its exceptions, and continuing the same text we find the following:

"A deed is not, however, always a merger of the articles of agreement, etc., nor are a vendor's or a purchaser's covenants necessarily merged or discharged, and a parol agreement may be suspended by the subsequently executed instrument. The question of merger has also been declared to be one of construction to be gathered from a consideration of the entire contents of the instruments." 13 Cyc. 616.

Appellant Lee agreed to sell certain described town lots. The purchase price for the land, not his right, title or interest, but the land itself, was agreed upon, which sum the vendees agreed to pay in installments, and in the meantime to pay all taxes and assessments thereafter to be levied on the premises. The intention of the parties must be gathered from the instruments, and their conduct with reference thereto. That respondent and her husband intended to buy the land, rather than an uncertain interest, cannot be questioned; and, in our opinion, they were justified in relying upon the text of the contract. The rule governing this case is well stated in *Morris v. Whitcher*, 20 N. Y. 41, as follows:

"In all cases then, where there are stipulations in a preliminary contract for the sale of land, of which the conveyance itself is not a performance, the true question must be whether the parties have intentionally surrendered those stipulations. The evidence of that intention may exist in or out of the deed. If plainly expressed in the very terms of the deed, the evidence will be decisive. If not so expressed, the

question is open to other evidence, and I think in absence of all proof there is no presumption that either party, in giving or accepting a conveyance, intends to give up the benefit of covenants of which the conveyance is not a performance or satisfaction. There are remarks of judges, in cases which need not be particularly referred to, which seem in their result to deny the possible co-existence of a deed and of a collateral writing, which qualifies its effect, especially if the collateral writing be made before the deed. But I have shown, I trust, that there is no such rule as observations of that nature would appear to suggest."

See, also, *Brennan v. Schellhamer*, 13 N. Y. Supp. 558; *Disbrow v. Harris*, 122 N. Y. 362, 25 N. E. 356.

Error is also predicated upon the allowance of oral testimony as to the conversations and assurances made by defendant Vernon with regard to the condition of the title after the written contract had been signed. Inasmuch as the case was tried by the court without a jury and is here to be tried *de novo*, the error, if any, cannot be held to be prejudicial. It is possible to determine this case upon the contract and deed without reference to the oral testimony. The rights and obligations of the parties cannot be measured by the deed alone. The contract is entitled to equal consideration.

"It is not the ordinary case of the breach of a covenant in a deed, where the remedy would be a suit on the warranty, but the respective contracts here are dependent upon each other. The deed was made in consideration of a separate instrument in writing entered into between the grantor and grantee, and it is very evident from that contract that it was not simply a deed of the fee that the appellant was contracting with reference to, but that it was the real title to the land, and the character of the deed was simply stipulated as a compliance with the forms prescribed for conveying such title; in other words, there is nothing to indicate that the appellants were contracting for the shadow rather than the substance." *Moody v. Spokane & University Heights St. R. Co.*, 5 Wash. 699, 32 Pac. 751.

Respondent undertook to buy something more than a

Mar. 1909]

Opinion Per CHADWICK, J.

chance title. This the contract shows. To segregate the words "a quitclaim deed to said premises," and hold her to the legal import of those words, without reference to their relation to other words and covenants in the contract, would be an injustice to the buyer and do violence to accepted rules of construction. If a party agrees to sell land, it is in legal effect an agreement to sell a title to the land. In the absence of a stipulation to the contrary, the law implies an undertaking on the part of the vendor to make a good title. 29 Am. & Eng. Ency. Law (2d ed.), p. 606; *Ankeny v. Clark*, 1 Wash. 549, 20 Pac. 583; 2 Warvelle, Vendors (2d ed.), 836. The form of conveyance is a secondary consideration. There may be reasons for giving or receiving a quitclaim deed. These will not be inquired into so long as that form of deed will convey the title agreed to be conveyed, in the contract itself.

Much of appellants' brief is taken up with a discussion of the effect of a quitclaim deed. The authorities cited refer to executed rather than executory contracts, and are not in point for that reason. The impression prevails to some extent that an agreement to sell land by quitclaim deed or other conveyance of less worth than a warranty deed, absolves the vendor from any obligation other than the execution and delivery of his deed; that it is a reservation of immunity on his part from all liability in damages for a breach of his contract or failure of title. This is erroneous. The effect of a quitclaim deed was considered in the case of *Ankeny v. Clark*, *supra*, where, after some discussion, the court said:

"... under the statutes of our territory, a quitclaim deed is just as effectual to convey the title to real estate as any other form of deed, and a grantee in a quitclaim deed is entitled to the same presumptions as to bona fides, and has the same rights, as a grantee in a deed of general warranty. This is undoubtedly true of a quitclaim deed which purports on its face to convey, not merely an interest, but the real estate itself."

The effect of a covenant to convey by special warranty deed was discussed in the case of *Baldwin v. Brown*, 48 Wash. 303, 93 Pac. 413;

"As the controversy is not as to the effect of a special warranty deed, but as to a contract to 'convey' by special warranty deed, and as the contract contains the expression 'that the said J. W. Brown reserves the right and title to said land until the same is paid for in full,' the respondent claims, and apparently the trial court was of the opinion, that appellant by said contract purported to have 'right and title' to said land, and agreed to 'convey' the same, and that the contract contemplated this, and that as a court of competent jurisdiction, prior to the final payment on this contract, had decided that appellant had no right or title whatever to said five acres, he was therefore unable to 'convey' by a special warranty deed, or by any other form of conveyance. The court, therefore, held that the appellant was not in a position to require respondent to pay for that which the former had agreed to, but could not, convey. We think this position must be maintained."

While in this case there is no express reservation of a title, reference to the whole contract shows that it was the intent of the vendor to retain title until full payment. He has made time the essence of the contract, and provided for forfeiture not only on account of failure to meet payments, but for any impairment of title by mechanics' liens, tax sales, etc. The case, therefore, rests upon the same principle. If a vendor who contracts to sell land has no title, or fails or refuses to furnish a proper title at the time the vendee is entitled to it, the latter can maintain an action to recover the purchase price. The vendor has assumed the attitude of ownership, and a failure to perform is in law a misrepresentation for which an action will lie. Appellants undertake to meet this proposition by reference to the case of *Decker v. Schulze*, 11 Wash 47, 39 Pac. 261, 48 Am. St. 858, 27 L. R. A. 335. They quote the following:

"Generally speaking, a purchaser after a conveyance has no remedy, except upon the covenants he has obtained, al-

Mar. 1909]

Opinion Per CHADWICK, J.

though evicted for want of title; and however fatal the defect of title may be, if there is no fraudulent concealment on the part of the seller, the purchaser's only remedy is under the covenants.'"

This is no more than a statement of an abstract proposition of law, and was evidently used to illustrate the main question before the court, which was the construction of pleadings. In that case plaintiffs had alleged that defendants were not seized in fee simple or possessed of the right to sell and convey. On this point the court said:

"This is, at most, equivalent merely to a statement that their interest in the granted premises was less than a fee simple estate, and cannot be held to be equivalent to an allegation that they had no estate or interest in the premises. We think this is wholly insufficient to constitute good pleading, at law or in equity."

In this case an absolute failure of title is alleged, and it will thus be seen that that case is not authoritative. We think the true rule is announced in the case of *Sears v. Stinson*, 3 Wash. 615, 29 Pac. 205, where the court upheld an action of this character, saying:

". . . but there is no reason either why he could not compel the party who has sold him more than he can deliver to return the excess payment; and that is simply what it amounts to. It is not a case in deceit, and a different rule of damage will apply altogether. There is no deceit alleged. It is an action under the statute, where the complaint is a plain and concise statement of facts constituting a cause of action. In this case the statement is, that by reason of false representations made by defendant, the plaintiff paid for more land than he received. There certainly can be nothing inequitable in this procedure if a just measure of damages is employed. The purchaser pays for what he gets, the vendor gets pay for what he has to sell; this is all he is entitled to, let his mistake be ever so innocent."

And in the later case of *Curtley v. Security Sav. Society*, 46 Wash. 50, 89 Pac. 180:

"While this court has, in common with many other courts, held that false representations involving mere matters of

opinion, or question of judgment, as much within the knowledge of one party as the other, are not grounds for an action of deceit, it has also held that false representations as to the quantity of land contained in a given description, or false representations as to the boundaries and location of land, or as to its title, if made positively and with the intent that they should be relied upon, were not of that sort, but were actionable if relied upon by the vendee to his injury. *Hanson v. Tompkins*, 2 Wash. 508, 27 Pac. 73; *Sears v. Stinson*, 3 Wash. 615, 29 Pac. 205; *Lawson v. Vernon*, 38 Wash. 422, 80 Pac. 559; *Freeman v. Gloyd*, 43 Wash. 607, 86 Pac. 1051. Such, also, is the general rule. 14 Am. & Eng. Ency. Law (2d ed.), pp. 24, 88; 29 Id. 654-657; *David v. Park*, 103 Mass. 501."

It is further argued that, because the words "a deed to said premises" as printed in the contract, were erased, and the words "quitclaim deed to said premises" written in lieu thereof, an intention of the parties to limit their contract to the legal effect of a quitclaim deed was manifested. It is the rule that, where written words are inconsistent with or contradict part of a printed form, the written words will be presumed to disclose the true intent of the parties. But the rule has no application to this case, for two reasons; (1) there is no inconsistency in the contract; and (2) a quitclaim deed in a case like this is, under our liberal rule of construction, in effect a bargain and sale deed or a "deed" as provided in the erased portion, and just as effectual to convey title as either of them.

Our conclusion is that the appellant Lee agreed, in consideration of a certain sum, to do two things: to sell the land described in the contract, and make a quitclaim deed. He has made the deed but he has failed to sell the land. The contract was mutual. As he reserved the right to protect his engagements by apt clauses in the contract, he will be bound upon payment to the full performances of his obligation. Having agreed to sell something he never owned, he cannot discharge that part of his agreement. Hence, it follows that respondent is entitled to recover the purchase

Mar. 1909]

Syllabus.

price. The contract was signed by appellant Vernon as agent for appellant Lee. He transacted all the business between the parties, but a careful reading of the statement of facts fails to disclose any act on his part inconsistent with the relation of agency. He could not have sued for a breach of the contract or for specific performance. He should not then be held liable as a principal. We think the court erred in rendering judgment against him.

In entering judgment the lower court fixed the rate of interest at ten per cent per annum. In this the court erred. Respondent is entitled to recover the legal rate of interest, but no more.

The case is affirmed as to appellant Lee, and reversed as to appellant Vernon, with instructions to the lower court to modify the judgment in so far as it provides for more than the legal rate of interest. Appellant Vernon will recover his costs against respondent. Respondent will recover her costs against appellant Lee.

RUDKIN, C. J., DUNBAR, GOSE, FULLERTON, and MOUNT, JJ., concur.

CROW, MORRIS, and PARKER, JJ., took no part.

[No. 7718. Decided March 29, 1909.]

WILLIAM B. NORTON *et al.*, Respondents, v. ELLIS H.

GROSS *et al.*, Appellants.¹

REFORMATION OF INSTRUMENTS — MUTUAL MISTAKE — EVIDENCE — SUFFICIENCY. The evidence clearly shows a mutual mistake, warranting the reformation of a deed to one and one-half lots, so as to include a parcel of land formerly constituting an alley between the lots, which had been vacated, where it appears that the vendors pointed out the lines of the entire tract as one parcel and represented that it abutted on both streets, and it was occupied as one tract for residence purposes at the time.

¹Reported in 100 Pac. 734.

QUIETING TITLE—CLOUD—WHAT CONSTITUTES. Hostile assertion of title to a parcel of land, formerly an alley which had been vacated, by the former owner of abutting lots, constitutes a cloud on the title which may be quieted under Bal. Code, § 5521.

STREETS—VACATION OF ALLEY—REVERSION TO LOT—DEEDS—PROPERTY CONVEYED. Upon the vacation of an alley it becomes attached to the lots as the property of the abutting owner, under Bal. Code, § 1269, and the title thereto passes under a conveyance of the lots, as a part of such lots.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered May 5, 1908, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to reform a deed and to quiet title. Affirmed.

F. Campbell, for appellants.

William L. Waters and *Harry H. Johnston*, for respondents.

GOSE, J.—This action was instituted by the respondents against the appellants, for the two-fold purpose of reforming a deed, and quieting title to the property in accordance with such reformation. The amended complaint avers, that on the 26th day of June, 1899, the appellants, in consideration of the sum of \$2,400 then paid to them by the respondents, sold to respondents a certain tract of land in the city of Tacoma upon which there was a residence; that the respondents at once took and continued in the possession of the same; that the appellants conveyed to the respondents, according to the description contained in the deed, lot 12 and the south half of lot 11, block 410, in the city of Tacoma, as the same were known and marked upon a certain plat; that by mutual mistake of the parties, there was omitted from such deed a quadrangular strip of land, lying between the westerly end of the property as described in the deed and the easterly line of Tacoma avenue, which had at one time been a part of an alley, but which had been vacated April 16, 1899; that such parcel of land was included in

Mar. 1909]

Opinion Per Gose, J.

the respondents' purchase; that the appellants were asserting title to the same. The appellants joined issue upon the averments as to the sale of the parcel of land which was not included in the deed. A decree was entered in favor of the respondents, reforming the deed and quieting title to the property. From this decree, the appeal is prosecuted.

The evidence clearly establishes, that the appellants acquired title by purchase to the one and one-half lots described in such deed on December 15, 1887; that at such time and until April 18, 1897, there was an alley between the westerly end of such lots and Tacoma avenue; that prior to the vacation of such alley, such lots abutted on E street on the east; that after the vacation of the alley, the lots extended from E street on the east to Tacoma avenue on the west; that immediately before the sale, the respondent husband, in company with the agent who negotiated the sale between the parties, called upon the appellants at their residence upon such property; that the appellant husband and the agent pointed out the lines of the property, and assured the respondent husband that the property abutted upon both E street and Tacoma avenue; that at such time the wood-shed on the premises was, and now is, situate upon the disputed parcel of land and abutted and now abuts on Tacoma avenue; that the house fronts toward E street; that at the time of the sale, the entire parcel of land between the two streets, to the extent of the width of the one and one-half lots, was and now is used as one parcel for residence purposes; that since the date of the purchase, the respondents have occupied this parcel of ground, paid the taxes assessed against it, and paid the assessments upon it for the improvement of Tacoma avenue. Upon the vacation of the alley, the appellants became the owners of it in virtue of their ownership of these adjoining lots at such time.

The appellants have assigned a number of errors, but have argued from them that there is no evidence that there was a mutual mistake of the parties; and that before a reformation

can be decreed the evidence must be clear and convincing that the property in dispute was sold by the appellants to the respondents, and that it was omitted from the deed by the mutual mistake of the parties. We think this is a correct statement of the law governing such cases. However, its application to this case is unavailing to the appellants. The evidence is clear and convincing to the effect that the appellants sold to the respondents the entire plat of ground between E street and Tacoma avenue to the extent of the width of the one and one-half lots, and that the former are asserting title to the part thereof that had formerly constituted a part of the alley. Such hostile assertion of title was a cloud upon the real title of the respondents, and fully justified the court in quieting the title by decree. Bal. Code, § 5521 (P. C. § 1156); *Lemon v. Waterman*, 2 Wash. Ter. 485, 7 Pac. 899; *Montgomery v. Cowlitz County*, 14 Wash. 230, 44 Pac. 259.

Moreover, as we have said, upon the vacation of the alley the land became the property of the appellants by virtue of their ownership of the abutting property. Bal. Code, § 1269 (P. C. § 3563); *Burmeister v. Howard*, 1 Wash. Ter. 207; 27 Am. & Eng. Ency. Law (2d ed.), 117. This being true, it attached to and became to all legal intent a part of the property described in the deed, and passed to the respondents under such conveyance. The decree will therefore be affirmed.

RUDKIN, C. J., CHADWICK, FULLERTON, MOUNT, CROW, and DUNBAR, JJ., concur.

Mar. 1909]

Statement of Case.

[No. 7495. Decided March 29, 1909.]

CHESTER A. PALMER, *Appellant*, v. BARNETT J. CLARK *et al.*,
Respondents.¹

VENDOR AND PURCHASER—OPTION—ACTION FOR DAMAGES—COMPLAINT—AMENDMENT—TENDER OF PERFORMANCE. In an action for damages for breach of an option contract to sell land, sold by defendants to a third party before expiration of the option, it is error to require the complaint to be amended to show what tender of performance was made by plaintiff; since tender was not necessary after defendants had incapacitated themselves from performing.

SAME—PLEADINGS—AMENDMENT—DEPARTURE—ABANDONMENT OF CAUSE. An amended complaint in an action for damages for breach of an option contract to convey land (required by the court to show a tender of performance by plaintiff) is not an abandonment of the original cause of action by reason of its showing certain new proposals relating to the purchase price, and a tender thereof by plaintiff, where the amended complaint set up the same contract as the original complaint, and alleged the same breach by the defendants' conveyance to a third party before expiration of the option.

SAME—OPTION—PAYMENT OF CONSIDERATION—EVIDENCE—SUFFICIENCY. Upon an issue as to the payment of \$50 for an option, the evidence conclusively shows that the payment was made, where the defendants drew therefor and the same was paid through banks and deposited to defendants' credit, and the defendants' attorney was authorized to, and did, write a letter acknowledging the deposit and offering repayment upon a return of the option.

SAME—DEFENSES—PURCHASER'S INABILITY TO PERFORM. Financial inability of the plaintiff to pay the purchase price is not a good defense to an action for damages for the breach of an option given upon defendants' land, subsequently sold by defendants to a third party before expiration of the option.

Appeal from a judgment of the superior court for King county, Albertson, J., entered January 30, 1908, granting a nonsuit at the close of plaintiff's case, dismissing an action on contract, after a trial before the court without a jury. Reversed.

Henry R. Harriman, Clay Allen, and Walter M. French,
for appellant.

Hayden & Langhorne, for respondents.

¹Reported in 100 Pac. 749.

DUNBAR, J.—This is an action for damages for a breach of contract to sell under an option agreement. The complaint was the ordinary complaint in such cases, alleging the option and setting it out as an exhibit in the case; alleging that the plaintiff had elected to take the land under the option, the value of the land, the refusal of the defendants to comply with the option, and that the defendants had, before the expiration of the option, sold the land to a third party, thereby incapacitating themselves from performing their contract. The plaintiff was required, on motion of the defendants, to amend his complaint by alleging what was done by the plaintiff in the way of tender during the sixty-five days within which he could exercise his option, and an amended complaint was filed. This complaint, after having been assailed by some motions which were allowed, was answered; which answer admitted the signing of the option contract, but denied that the plaintiff or any other person paid the defendants the sum of \$50, or any other sum, for signing said paper writing; also admitting that, since the signing of the alleged option agreement, defendants had sold the property described.

For a second defense, the answer admitted the execution of the option agreement, and the execution and transmission of the same to the plaintiff, and that the plaintiff neglected and refused to accept said paper writing, or to pay defendants the sum of \$50, or any part thereof; and alleged that the plaintiff, at all times in said amended complaint and the answer mentioned, was financially unable to purchase said premises, was in all respects financially irresponsible, was not possessed of sufficient means to purchase said premises at any time, and at the time of said paper writing secured by these defendants, plaintiff had no intention whatever of purchasing these premises. The affirmative matter in the answer was denied by the reply. At the conclusion of the plaintiff's testimony, motion for nonsuit was made by the defendants, which was granted by the court, and the cause was dismissed,

Mar. 1909]

Opinion Per DUNBAR, J.

the court taking the view that, under the amended complaint, there was no longer any suit upon the option, but that another contract had been set up, and that tender under the new contract pleaded had not been made. The plaintiff asked leave to introduce testimony to meet the requirements of the court, but the court refused to allow the same to be admitted.

An investigation of this record convinces us that there has been a miscarriage of justice. As we have indicated above, the complaint was a simple action for damages for the violation of an option contract, and no amendment should have been required of the appellant. For it is too well established to warrant the citation of authority that a complaint which shows the making of a contract and the violation of the same by the defendant, and alleges the amount of damages resulting to the plaintiff from the breach, contains the essential elements of a good cause of action *ex contractu*; and that the tender of performance by one party to a contract is not necessary when the other party places himself in a position where it can be readily seen that he cannot comply with the contract, or absolutely repudiates the contract by denying its existence; this, because it is idle to compel the plaintiff to do a useless thing, and to make a tender which under the facts pleaded could not possibly be accepted.

But, considering the case on the amended complaint, we think it was too severely construed by the court, and that the complaint was not an abandonment at all of the original cause of action, but that it simply, in addition thereto, alleged stipulation in regard to the manner in which the payments were to be made under such option agreement. The amended complaint alleges the ownership of the land in the defendants; that on the 23d day of February, 1907, the defendants signed, sealed, acknowledged, and delivered their written contract, wherein they agreed to convey to the plaintiff the said real estate, in consideration of \$10,000, and at the time of making said contract the plaintiff paid to the defendants the sum of \$50 as consideration to said defendants

for entering into said contract, and that the contract was more particularly described and a true copy of said contract attached thereto marked Exhibit A, and made a part of the complaint. This is the same contract and the same exhibit that are set forth in the original complaint. It then alleges, that on the 21st day of March, the defendants sold said property to a third person, the option being given on February 23, and the limit of the option being sixty-five days. It is true the appellant alleges that, subsequent to the execution of the contract, the appellant had made certain proposals to the respondents in relation to the payment of the purchase price, viz., that they should accept the sum of \$5,000 with mortgage back for the balance of the purchase price; and alleges that the appellant thereafter, on the 18th day of April—which was within the time of the option—tendered to the respondents the sum of \$5,000, and offered to execute said mortgage. Now, because the tender of this \$5,000 was not proven to the satisfaction of the court, the ruling was made and the cause dismissed. But, as we have seen, the tender was not necessary after the action of the respondents in incapacitating themselves from complying with the contract.

So far as the merits of the case are concerned, they are absolutely with the appellant; for while the respondents deny the payment of the \$50 provided for by the option contract, the proof is conclusive that the payment was made, the respondents having drawn on the appellant at a bank in Centralia through his bank in Seattle, and the money having been paid to the Centralia bank and returned to the Seattle bank, the banker testifying that he notified the respondents of the payment by the appellant, and that the money was placed to their credit there. This question is also put at rest by the following letter:

“Mr. Chester Palmer, Centralia, Washington.

“Dear Sir:

“In February last you requested Mr. B. J. Clark of Seattle to give you an option on the timber tract in Lewis county. I prepared the option for Mr. Clark and I think it

Mar. 1909]

Opinion Per DUNBAR, J.

was sent you through a bank here. Nothing was heard from it until quite recently. Mr. Clark concluded that you did not care to take the option up and made other arrangements about disposing of the property. The bank recently advised Mr. Clark that it had the option price for him. He directed the bank to return the money to you and take up the option. If you will kindly call at the bank where you paid the money, you can get the same back and either turn the option to the bank or return same direct to me, and oblige,

"Yours very truly, H. E. Foster."

It was admitted upon the trial that Foster had authority to write the letter for his client, the respondent in this action, and it will be noted also that the date of this letter was before the expiration of the option contract, and the deed which had been made by the respondents to the third party was also executed before the expiration of the sixty-five days provided for in the option, and was introduced in testimony. So far as the allegation of the answer is concerned, that the appellant was without capacity to carry out the provisions of his contract, that was a matter for the investigation of the respondents before they entered into the contract. The presumption, at least, must be, in the absence of any showing to the contrary, that the appellant was able to perform the conditions of his contract. It was well proven by competent testimony that the value of the land at the time of the breach of the contract was more than the purchase price.

We think the motion to dismiss the action should not have been sustained, and the judgment will therefore be reversed.

RUDKIN, C. J., MOUNT, FULLERTON, and CROW, JJ., concur.

GOSE, CHADWICK, MORRIS, and PARKER, JJ., took no part.

[No. 7875. Decided March 29, 1909.]

A. W. SMITH, *Appellant*, v. SPOKANE FALLS & NORTHERN
RAILWAY COMPANY, *Respondent*.¹

MASTER AND SERVANT—OBSTRUCTIONS NEAR RAILROAD TRACK—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The foreman of a wrecking crew in charge of a large number of laborers being transported in box cars, charged with the duty of looking after their safety, is not guilty of contributory negligence, as a matter of law, in looking out of the side of the car to discover the cause of an alarm and the swaying of the cars indicating danger ahead, whereby he was struck by a coal chute of which he had no knowledge and which was negligently constructed nine inches nearer to the tracks than the ordinary minimum distance, the side doors of the cars being the only way of egress; as his judgment in such case cannot be too closely scanned. (Gose and Mount, JJ., dissenting).

SAME—OBSTRUCTIONS NEAR TRACK—PROXIMATE CAUSE OF INJURY. The maintenance of a coal chute dangerously near a railroad track is the proximate cause of an injury to one who, in the line of his duty, has occasion to look out the side door of a box car.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered May 18, 1908, granting a nonsuit at the close of plaintiff's case, after a trial before the court and a jury, in an action for personal injuries. Reversed.

Fred Miller and Robertson & Rosenhaupt, for appellant.
L. C. Gilman (A. J. Laughon, of counsel), for respondent.

DUNBAR, J.—The plaintiff was in the employ of defendant, as foreman of a gang of men whose duty it was to fix tracks, pick up wrecks, and generally assist in the repair of the roadbeds where wrecks, washouts, and other damages had occurred. The plaintiff had been in the employ of the defendant company before, but during his absence the defendant erected a large coal bunker near its track at Valley station. The coal was taken from the bunker by means of chutes which were pulled down and balanced by heavy iron

¹Reported in 100 Pac. 747.

Mar. 1909]

Opinion Per DUNBAR, J.

weights hanging beneath them. These weights were attached in such a manner that, when the chute was put back in place after having been emptied of coal into the tender of the engine being supplied, they would at places project beyond others towards the track and come very close to the sides of the box cars standing or passing upon the track, some as close as fifteen inches. The plaintiff was in charge of nine ordinary box cars, with between fifty and sixty Italian workers in them. The men slept and ate in the box cars, and were moved from place to place in said cars. The plaintiff testified that, when approaching the above mentioned coal bunker and station at Valley, his attention was called to a noise made by some one hallooing, and to the rolling of the cars in which they were confined, and that in order to discover the cause of the alarm he put his head out of the side door of the box car, and was struck on the head by the weight of one of the coal chutes, injuring him, for which injury this suit was brought. At the close of plaintiff's testimony, judgment of nonsuit was granted on motion of the defendant, and this appeal follows.

It may be said that the only way of ingress to or egress or observation from the cars in question was by the side doors. It was the contention of the respondent, and so expressed in its motion, that there was no proof establishing on the part of the appellant any want of care or any negligence of the respondent. The court took the view, that there was no testimony showing that the appellant was acting in the discharge of his duty when he put his head outside of the car; that he was an employee simply being transported, was not in charge of the train, and was in no wise authorized to direct its movements; and that when he put his head out of the car he was guilty of contributory negligence which would bar his recovery. The record shows, and it was conceded, that the coal chute in question was dangerously near the track, and it was further conceded that the appellant did not know it was there. This chute was some nine inches

nearer than the minimum distance of the ordinary chute, and the principal question discussed is whether the appellant was in the line of his duty when he put his head out of the door, the contention of the respondent being, as was indicated by the court, that he was not in charge of the train in any way, and that his cars were attached to freight cars which were in charge of regular officers. The testimony is not as definite as it might be as to what the duties of the appellant were, but he did testify that his duty was that of doing work and looking after the men. In describing the affair, the appellant testified as follows:

"Q. Now, just state what happened on this evening, Mr. Smith. A. As we approached Valley station the train gave a roll and there was a noise, some one talking or hollering, and I looked out the door. . . . I just looked out and looked around to see what was up. . . . I came in contact with a weight on the coal chute at the back of my head. . . . In pulling into Valley station on the 7th day of August, 1906, the car gave a roll and I looked out to see what was up. Some one called loud or something, and I gets up in the car and looks out, and the minute I looks out the car gave a kind of roll and the weight—the weight piece—it is like a weight—I don't know what it is but it is like a weight, attached to the coal chute, it was very close and it cut my head there and it knocked me to my knees in the car and came very near driving me out."

The appellant also testified that there was no way of looking out of these outfit cars excepting by the side doors; and that that was the usual way in which employees performed the duty of seeing if anything was the matter with the train, while the train was in motion. Again, in describing the affair, he testified:

"It was my duty to see none were hurt. I heard a cry and the car was beginning to roll, and I stepped to the door to look out, and some one was calling, you know, and I looked out and the roadmaster looks out one side of the car and I the other side and I was struck there," etc.

He also testified, that he was assisting in every way pos-

Mar. 1909]

Opinion Per DUNBAR, J.

sible so as not to delay trains when they were on the line moving from one point to another; that they had tools and one thing and another on the train, which it was his duty to look after and see that none were lost; that the tools were sometimes packed under the cars and taken from one point to another, and that it was his duty to look after the tools and outfit. The above is substantially the testimony in the case. The testimony of the appellant and other witnesses was also to the effect that, at the distance the ordinary chutes were from the cars, a man would not have been hurt if he had put his head out as he did in this instance.

Respondent cites, and it is claimed that the court relied upon, the case of *Krebbs v. Oregon R. & Nav. Co.*, 40 Wash. 138, 82 Pac. 130. But whatever may be said of that case, the rule announced there would not be controlling in the case at bar. That was where the brakeman was struck by a projecting bolt, while riding on the side of a car when the train was passing through a bridge between two stations, where it was not his duty to ride on the side of the car at that place, and where the rules of the company required him to know the position of bridges. The court, with reference to the notice that must be given, distinguished bridges from other less fixed structures in the following language:

"Numerous cases are cited where railway companies have been held liable to employees for injuries received from section houses, depots, coal chutes, signal posts, telegraph poles, etc., situated too close to the track. Those structures differ materially from railroad bridges, which constitute a permanent part of the roadbed, and are of necessity part and parcel thereof."

Most of the cases cited by the respondent are of that kind. It must be conceded in this case that the railroad company was guilty of negligence in building this dangerous structure closer than was necessary to the track; and unless it appears that the appellant was guilty of contributory negligence or that he assumed the risks incident to the duty which

he was performing, it necessarily follows that the respondent is responsible to appellant for the injuries which he sustained. The rule is laid down by 3 Elliott on Railroads (2d ed.), § 1303, as follows:

"If the employee is, at the time of the injury, reasonably within the line of his duty he is within the rule that the employer is bound to exercise ordinary care to prevent injury to him because of defects in the working place or appliances."

As to the proximate cause of the injury, it must necessarily have been the negligence of the company in maintaining the dangerous structure unnecessarily near the track. In discussing this question, it is said by the court in *Baltimore etc. R. Co. v. Reaney*, 42 Md. 117, 136, quoted by the court in *Maryland Steel Co. v. Marney*, 88 Md. 482, 42 Atl. 60, 71 Am. St. 411, 42 L. R. A. 842, at page 847:

"But it is equally true that no wrongdoer ought to be allowed to apportion or qualify his own wrong; and that as a loss has actually happened, whilst his own wrongful act was in force and operation, he ought not to be permitted to set up as a defense, that there was a more immediate cause of the loss, if that cause was put into operation by his own wrongful act. To entitle such party to exemption, he must show, not only that the same loss might have happened, but that it must have happened, if the act complained of had not been done. . . . The principle is well settled that whoever does a wrongful act is answerable for all the consequences that may ensue in the ordinary and natural course of events, though such consequences be immediately and directly brought about by intervening causes, if those intervening causes were set in motion by the original wrongdoer."

On the question of the nice judgment which is to be exercised by an employee in the attempt to save either himself or his fellow workmen, or those under his control, from peril, the courts all agree that his action at such time cannot be too closely scanned, or his judgment too nicely weighed. But this case is essentially different in the main from the ordinary cases cited and relied upon. Here a large number of men were confined to box cars with no means of escape or of pro-

Mar. 1909]

Dissenting Opinion Per Gose, J.

tecting themselves excepting by egress through the side doors of the cars. It would certainly be a monstrous doctrine to announce that a human being could be shut up in a box car, and that, when his position became apparently dangerous, if he undertook to escape the danger or to guard against it by making the reasonable and necessary observations of the situation, such effort on his part should be the cause of the loss of his rights. In the case at bar, if the testimony of the appellant is true, notwithstanding the fact that he was in charge of the running of the cars, he was in charge of this large body of men, and it was his duty to look out for them, and upon notice of any kind, either the hallooing of the men or the swaying of the cars, indicating danger to the men, it was his imperative duty to make such observation and examination as was necessary for the protection of the men under his care and control.

We think there was sufficient testimony on this subject to go to the jury, and the judgment will therefore be reversed.

RUDKIN, C. J., CHADWICK, FULLERTON, and CROW, JJ., concur.

Gose, J. (dissenting).—The appellant was an employee of the respondent and being carried to a place where he and his men were to work. He was not engaged in the performance of any duty. When he put his head outside of the car 15 inches, without looking forward to see what he was approaching, he was clearly guilty of contributory negligence. I therefore dissent.

MOUNT, J., concurs with Gose, J.

PARKER and MORRIS, JJ., took no part.

[No. 7526. Decided March 30, 1909.]

EDWARD AUNE, *Respondent*, v. AUSTIN-WILLIAMS TIMBER
COMPANY, *Appellant*.¹

FIRES—ACTION FOR LOSS—COMPLAINT—ALLEGING TITLE TO PROPERTY DESTROYED—LOGS—CONTRACT FOR CUTTING. In an action for the value of poles cut by the plaintiff upon defendant's land, under a contract whereby plaintiff was to cut, yard, and measure the poles and pay defendant therefor, lost by a fire negligently set out by defendant, the plaintiff need not allege that his title to the poles had vested by the completion of his work and payment therefor; since he was not working for wages and had a certain value invested in the poles.

Appeal from a judgment of the superior court for King county, Griffin, J., entered April 11, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to recover damages for loss of property destroyed by fire. Affirmed.

John B. Hart and *Robert H. Evans*, for appellant.

Martin J. Lund, for respondent.

DUNBAR, J.—This was an action by the plaintiff against the defendant, to recover damages for the loss of poles destroyed by a forest fire started, as alleged, through the negligence of defendant. The defendant was the owner of a large tract of timber land in Jefferson county, and was conducting logging operations there, using donkey engines for carrying on its work. On April 16, 1907, the defendant entered into a contract with plaintiff whereby the plaintiff agreed to cut all poles standing upon the lands of defendant, and to yard them to defendant's skid road, paying therefor so much per lineal foot stumpage charges, defendant agreeing to haul the poles to water at so much each. The plaintiff employed several men and began work under the contract, and by the 27th of June he had cut and yarded a large num-

¹Reported in 100 Pac. 746.

Mar. 1909]

Opinion Per DUNBAR, J.

ber of poles. The yard donkey of defendant was located in the woods, and when the plaintiff under the contract piled the poles that he had cut close to its skid road, the donkey engine was moved by the defendant up to the poles. On the 27th of June, a fire occurred in the forest close to the yard donkey of defendant. The fire started on Monday, and on Monday a certain number of poles were burned. On Tuesday the fire continued, and other poles were burned. This action was brought for the value of the poles that were burned, their value being alleged at something over \$1,500. The case was tried by the court without a jury, and the court permitted a recovery only for the poles which were burned the first day, the judgment being for \$115.50, but held that the plaintiff, having had information of the fire which was raging on the second day, and not having made any attempt to put it out, contributed to the disaster and could not recover therefor. A demurrer was interposed to the complaint, on the ground that the complaint did not state facts sufficient to constitute a cause of action. There was a second ground alleged in the demurrer, but it was substantially the same as the first. The demurrer was overruled, and this is alleged as error.

It is the contention of the appellant, that the respondent could not recover the value of the poles which were destroyed, under the allegations of the complaint, there still having been something remaining to be done before a title would vest in the respondent, the poles not having been measured or hauled, and the respondent never having paid for any of them; that the only thing under such a contract that the respondent could recover would be the value of the work which he had put upon the poles; and some few cases are cited to sustain this contention. But this is not that kind of a case, as was *Meeker v. Johnson*, 3 Wash. 247, 28 Pac. 542, where hops had been bought on a rising market and the question of title became necessary in the determination of the case. Here there is no question of title necessary, and no rights of any third parties as to responsibility for the goods lost involved.

The respondent had a certain value invested in these poles, and that value was destroyed by the negligence of the appellant. The respondent was not working for wages, nor was the appellant to pay him under their contract for the value of his wages. Therefore, he was entitled to his bargain under his contract. If appellant's theory is correct, at any time during the transaction if the appellant had discovered that it had made a contract in which it was giving more for the work performed than it might have got the work performed for from some other source, it could have repaid respondent for his labor, and taken to itself the profit which under the contract belonged to the respondent. We think the court properly overruled the demurrer to the complaint.

On the merits of the case, the court found that the appellant carelessly allowed the fire to spread from its donkey engine to the poles cut by the respondent, and that they were thereby destroyed, and that said fire spread from the donkey engine without the knowledge of the respondent; this, with reference to the poles which were burned the first day, being the only poles for which the court allowed a recovery. Exceptions are made to these findings of fact and conclusions of law, but we are satisfied from the record that they were entirely justified, and that the court committed no error in the findings or conclusions made, or in the admission of testimony.

The judgment will therefore be affirmed.

RUDKIN, C. J., CHADWICK, FULLERTON, MOUNT, CROW, and GOSE, JJ., concur.

MORRIS and PARKER, JJ., took no part.

Mar. 1909]

Statement of Case.

[No. 7630. Decided March 30, 1909.]

**K. E. KALINOWSKI *et al.*, Respondents, v. ADAM JACOBOWSKI
et al., Appellants.¹**

EASEMENTS—GRANT OF RIGHT OF WAY—SECURITY—INTENT. The intent to grant an easement of a right of way is not disproved by the fact that security was taken to insure the faithful defense and maintenance thereof.

SAME—CONTRACT FOR EASEMENT—FORMALITY—CONSTRUCTION. A written contract whereby the grantor, in consideration of two hundred dollars, covenanted to clear and make a road across his own land and that of another, eight feet wide along the east line of the tract, suitable for the grantee to drive over from the grantee's land to a county road, and "to maintain and defend the said right of way," is the grant of an easement or right of way across his own land, and sufficiently definite and certain; no particular form of words being necessary, and his authority as to the land of a third person being immaterial or presumed.

SAME—DESCRIPTION—DEFINITENESS—USE OF WAY. The definiteness of a written grant of a right of way is immaterial after the way has been entered upon and used.

SAME—GRANT—ESSENTIALS—VALIDITY IN EQUITY. A grant of a right of way need not be by deed, but is valid in equity if the consideration has passed between the parties, and the contract has been fully performed.

EQUITY—INJUNCTION—OBSTRUCTION OF EASEMENT—REMEDY AT LAW. Equity will restrain the obstruction of a right of way by fences, as the remedy at law is inadequate.

VENDOR AND PURCHASER—NOTICE OF EASEMENT—RECORDING CONTRACT—VISIBLE USE. The purchaser of real estate is charged with notice of a right of way by open and visible use of the easement although the contract therefor was not recorded.

Appeal from an order of the superior court for King county, Morris, J., entered May 5, 1908, granting a temporary injunction, in an action to require the removal of obstructions placed upon a private right of way. Affirmed.

S. H. Steele, for appellants.

Sayre & Sutherland, for respondents.

¹Reported in 100 Pac. 852.

DUNBAR, J.—The plaintiffs commenced this action, praying for an order directing the defendants to remove a fence and other obstructions across an alleged private right of way. The court, after a hearing on affidavits, granted a temporary order against the defendants, among other things directing that these defendants forthwith remove or cause to be removed any fence or other obstructions placed, or caused to be placed, upon or near said alleged right of way by said defendants herein, or either of them, since the 6th day of March, 1908, if said fence or other obstruction prevents or interferes with the use of said alleged right of way by the plaintiffs herein or their lessees. Claim of right of way is based upon the following agreement, which is made an exhibit and part of the complaint in the action:

“This agreement, made and entered into this eleventh day of May, A. D., one thousand nine hundred and seven, by and between Isadore M. Gladding (a single man) of South Park, Washington, party of the first part, and K. E. Gladding (a single woman) of South Park, Washington, Witnesseth: That the said party of the first part in consideration of the covenants and agreements hereinafter made by the party of the second part, hereby covenants that the said first party will clear and make a road suitable to drive over from the K. E. Gladding eight and $\frac{1}{2}$ acres in the northeast quarter of the northwest quarter of section five (5), township 23 range 4, east W. M., King county, Washington, over and across the John Swanson three acre tract adjoining the K. E. Gladding on the west, thence north along the east line over and across the land now owned by Isadore M. Gladding, to the county road, which is also the north line of township 23, range 4 E., King county, Washington. And he further agrees to maintain and defend the said right of way against any one claiming or to claim the said right of way or in any way prevent the free and unobstructed use of it by K. E. Gladding, or her successors or assigns.

“The said roadway or right of way to be eight feet wide on the straight road and of sufficient space to turn the corner with a farm wagon and a team. And the said party of the second part in consideration of the covenants and agreements of the said first party hereto covenants and agrees to and with

Mar. 1909]

Opinion Per DUNBAR, J.

said first party that she the second party hereto will pay to Isadore M. Gladding the sum of two hundred (\$200) dollars lawful money of the United States cash in hand this day and date first above written, receipt of which is hereby acknowledged.

"And for the true and faithful performance of all and several the covenants and agreements mentioned the first party herewith pledges all his right, title and interest to any and all property and lands owned by him, to insure the faithful defense and maintenance of the above described right of way.

"In witness whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

"Isadore M. Gladding,

"K. E. Gladding."

It is alleged that defendants, claiming to be the owners of the land through which the right of way was granted, have built a fence across such right of way and otherwise obstructed said right of way, etc. The answer denied the execution of the right of way to the plaintiffs, and the deed-ing of the property to them; and alleged affirmatively that, at the time of the execution and delivery of the deed to defendants, they had no knowledge or information of the existence of the pretended contract set out in exhibit A attached to the plaintiff's complaint; that said contract had not been filed or recorded in the office of the county auditor of King county at the time of, or prior to, the purchase of the property affected, and that the defendants' deeds to said land were filed for record and recorded prior to the filing and recording of exhibit A. From a judgment of the court granting the injunction, this appeal is taken.

It is assigned that the court erred in holding the right of way contract to be a deed or easement, and it is insisted that the right of way contract does not grant an easement or otherwise incumber the land, but that it is simply a personal contract which can in no way be enforced against the land. It is contended here that it is simply a contract on the part of Isadore M. Gladding to clear out a road; that it does not appear that the road was ever cleared, and that

no time is fixed in the agreement in which the clearing was to be done; that while it is possible that Gladding might be liable on his covenant for damages, it was not an easement or grant of any kind, and that it was not a license, and, even if it were, it was revoked by the failure to make and clear the road, and the sale and conveyance of the land; that the parties construed the instrument to be only the personal contract of Isadore M. Gladding to clear, make, and fence the road, and not the grant of an easement. This contention is made on account of the provision in the agreement in relation to security for the insuring of the faithful defense and maintenance of said right of way. On this proposition the simple fact that security was taken by the respondents for the faithful performance of the contract on the part of Isadore M. Gladding, does not in itself refute the idea that the parties intended to convey and receive a right of way across the land described. It was competent for them to provide for security in case of a breach for the clearing of the right of way, or for that matter for any other breach of the contract.

The grant of a right of way does not have to be in any particular form of words. The expression "right of way" is a common expression occurring so frequently that it may be said that its meaning is well understood by intelligent persons generally, and that it is understood to be the right of a person to travel over a particular tract of land without interference. If there be no ambiguity, the intention of the parties must of course be arrived at from the language used, where the words are to be construed in their ordinary and popular sense. But if there be ambiguity, the intention of the parties must be determined from such construction as can reasonably be given to the language used and to all the circumstances surrounding the transaction, including the situation of the parties, the subject-matter of the deed or contract, and the subsequent acts of the parties under it. In this case, so far as the formalities of the alleged grant are concerned, they were all met. The contract was in writing; it was under

Mar. 1909]

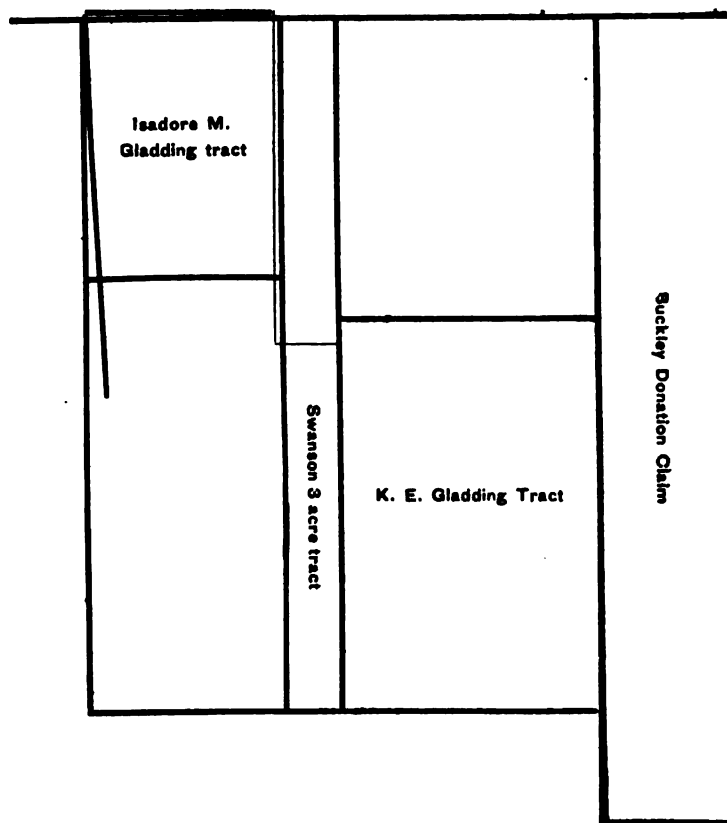
Opinion Per DUNBAR, J.

seal; there was a consideration, execution, and acknowledgment; and if it can be conceded that the description was sufficient to enable one to locate the land attempted to be granted, then it seems to us that a sufficient grant of an easement appears. If we have a proper conception of the manner in which the land lies, it is expressed in the accompanying map, the heavy lines near the north and west sides of the Isadore M. Gladding tract showing the county road and the light lines at the east side showing the right of way which was conveyed.

NORTH



North line of Twp. 23



From this map it will be seen that the right of way conveyed, if it started from the K. E. Gladding tract, must necessarily have crossed the Swanson tract south of the south line of the Isadore M. Gladding tract, and that when it did so cross the Swanson tract, and then turned north, as is stated in the contract, and ran thence north along the east line over and across the land owned by Isadore M. Gladding, to the county road, it must necessarily have run along the whole of the east boundary of the Isadore M. Gladding tract and have described an eight-foot strip on the east boundary of said tract. It is of no concern to the appellants whether the description is definite or indefinite up to the point where it reaches his land. From there on, as we have seen, the description is definite and certain, and includes eight feet off of the east boundary of appellants' land. Nor does the right of the respondents to deed this right of way across Swanson's three-acre tract concern the appellants. It may reasonably be inferred that Isadore M. Gladding had authority of some kind, which it was not necessary for him to discover to strangers, to run the line across said tract and also northward along the tract immediately south of the Isadore M. Gladding tract. In addition to this, it is well established that, if a right of way is entered upon and used, the way becomes definite and fixed even though it may have been indefinite in its description.

Appellants cite the case of *Van de Vanter v. Flaherty*, 37 Wash. 218, 79 Pac. 794, in support of the theory that this description is too indefinite, but an examination of that case convinces us that it does not bear on the circumstances of the case at bar. That case was decided on the theory that the findings of fact and decree described the land contrary to the description given in the complaint. The court, in concluding its remarks, said:

"The case does not seem to have been tried with a view to locating the roadway in question with any degree of certainty, and this court is unable, from the testimony, to cor-

Mar. 1909]

Opinion Per DUNBAR, J.

rect the description, or remove the ambiguity which is apparent on the face of the record. The decree is certainly a departure from the complaint, and all the testimony seems to locate the roadway at some place along the westerly side of the southwest quarter of the northeast quarter of said section."

There was evidently no intention in that case to overrule the case of *Everett Water Co. v. Powers*, 37 Wash. 143, 79 Pac. 617, a case which was decided at the same term of the court, where many of the questions were raised that are raised in this case, and where the court, in discussing the question of uncertainty as to the location of the right of way, said:

"It is next urged that the deed is void for uncertainty as to the location of the right of way. It is true, the exact boundaries are not described in the deed, except as to the tracts of land over which the pipe lines are run. Such was true, also, in the case of *McCue v. Bellingham Bay Water Co.*, *supra*. After the execution of the deed granting a roving right of way, the water company in that case entered upon the land, selected a strip, and took possession of it as the right of way. The court said: 'When it went upon the land described in the deed and cleared and prepared its right of way, its grant became fixed and certain.' In the case at bar the pleadings admit, and the evidence shows, that such a selection and occupation of a right of way strip took place in 1891. Not only was the route marked out and selected, but a ditch was dug upon the strip, with the intention of using the right of way for the purposes of the grant. Under the *McCue* case, the grant here therefore became fixed and certain as to location."

The *McCue* case referred to is reported in 5 Wash. 156, 31 Pac. 461. It may be well to say here that the testimony in this case, which was based entirely upon affidavits, is absolutely conflicting as to the occupancy of this alleged right of way as a road; the testimony offered by the appellants being that the right of way was never occupied as a road by the respondents or any one else, and that it was in a wild condition at the time of the purchase of the land by the ap-

pellants; while the respondents, on the contrary, introduced testimony tending to show that for many years prior to the appellants' purchase of the land and prior to the grant of the right of way, this strip of land had been used by the respondents as a way of ingress to and egress from the county road, and that there was no other way of reaching the county road. The trial court evidently adopted the theory of facts as shown by the testimony of the respondents, and we are inclined to do the same, and on this theory of the testimony, that the road was used and known to be used as a road prior to appellants' purchase of the land, this opinion is based. The scrivener who made out this instrument also testified in the case that, when the parties came to him to have the instrument drawn, they told him that they wanted to deed a right of way, and that in his presence the respondents paid the appellants \$200 as a consideration for the same.

So far as we are able to ascertain, it has always been the law that where a servitude, such as a right of way, has been granted by an instrument in writing, the fact that the dominant tenement has not been acquired at the date of the instrument cannot, after it has been actually acquired, prevent the servitude becoming a legal accessory to the dominant tenement, provided the servitude was so used as to give reasonable notice of the burden to any person in whom the property of the land might subsequently become vested. This was held in *North British R. Co. v. Park Yard Co.*, Appeal Cases, 1898, p. 643, and the court, in passing upon this question and reviewing the authorities at length, said:

"I think it necessary to add that, in my opinion, the fact that the contract or writing to which the origin of the privilege is ascribed is conceived in terms which might appropriately be employed in the constitution of a personal obligation is not conclusive against the constitution of a proper burden upon the land, if it be matter of reasonable inference from the terms of the document taken as a whole, or from the circumstances of the case, that the constitution of a real servitude was what the parties contemplated."

Mar. 1909]

Opinion Per DUNBAR, J.

This has been the holding in America as well as in England. The text in 14 Cyc., 1162, is as follows:

"It is settled law that easements may be created by agreements or covenants, that one shall have a right or privilege in the estate of another as well as by express grants; such agreements are grants in effect;"

citing *Van Ohlen v. Van Ohlen*, 56 Ill. 528, where it was said:

"It is insisted by counsel for appellee that this is a mere license, revocable at will, and cannot become a vested right of the character of an easement, except by deed under seal. But the cases cited in support of this position differ from the one at bar in this essential particular: Here, there was a valuable consideration passing from the plaintiff to the defendant, for which the latter agreed to perform a certain act, the effect of which would be a benefit to the plaintiff. The cases cited were mere licenses without consideration, and, of course, revocable when not created by deed."

The case at bar does not go so far as cases cited, because there was an instrument under seal in this case; but otherwise the cases are parallel, for here, as there, there was a valuable consideration passing from the plaintiff to the defendant. What could the consideration for the payment of the \$200 have been? Certainly not, as counsel intimate, the clearing of the strip of land described; for what could the clearing benefit the grantee if she was not to be permitted to use the strip of land? It is manifest that the \$200 was paid for the right of way. In *Dickinson v. Crowell*, 120 Iowa 254, 94 N. W. 495, it was decided that, where a right of way was decreed over the lands of another, it was not necessary for the parties to expressly designate its location but it was sufficient if a right of way was used and acquiesced in. In *Ashelford v. Willis*, 194 Ill. 492, 502, 62 N. E. 817, the court said:

"While at law, in order to constitute a valid conveyance of real estate or any interest in land, it must be by deed having a seal and attended with certain formalities, yet in equity

a good and indefeasible title may be conveyed without any writing whatever. The rights of the parties depend upon the character and extent of performance and the effect upon the donee by allowing repudiation. Practically all the writers on equity jurisprudence are agreed that contracts not under seal, and even contracts not in writing affecting or concerning an interest in land, are recognized in equity, if they have been so far performed that to permit a party to repudiate them would of itself be a fraud,—and this court is committed to that doctrine;”

citing many cases. The overwhelming weight of authority, without further citation, is to the same effect. As to the question that equity has no jurisdiction in this particular case, it was stated by the supreme court of Illinois in *Carpenter v. Capital Elec. Co.*, 178 Ill. 29, 36, 52 N. E. 973, 43 L. R. A. 645:

“Where a party has a right of way over, or an easement in, certain real estate, and the same is obstructed, equity has jurisdiction, as the injured party has no adequate remedy at law. . . . Moreover, the injury complained of is one of a continuing or permanent nature, for which an action at law would not afford a complete and adequate remedy.”

To the same effect is *Sterling's Appeal*, 111 Pa. St. 35, 2 Atl. 705, 56 Am. Rep. 246.

Lastly, the appellants cannot complain that the grant was not recorded at the time of their purchase, for the purchaser of a servient estate is charged with notice by open and visible use of the easement, and is not under such circumstances protected by recording acts. *Croke v. American Nat. Bank*, 18 Colo. App. 3, 70 Pac. 229; *Van de Vanter v. Flaherty*, *supra*.

Under the weight of the testimony in this case, as we view it, we think the court committed no error in decreeing the injunction which he did. The judgment will therefore be affirmed.

RUDKIN, C. J., CHADWICK, FULLERTON, MOUNT, CROW, and GOSE, JJ., concur.

MORRIS and PARKER, JJ., took no part.

Mar. 1909]

Opinion Per CHADWICK, J.

[No. 7790. Decided March 30, 1909.]

WALLA WALLA FIRE INSURANCE COMPANY, *Appellant*, v.
CHARLES H. SPENCER *et al.*, *Respondents*.¹

COMPROMISE AND SETTLEMENT—VALIDITY—CANCELLATION—DURESS—EVIDENCE—SUFFICIENCY. A compromise whereby an insurance company paid its agent \$5,000 cash and gave notes for \$15,000, in consideration of the surrender of stock and of an agreement for the agent's employment covering a long term of years, cannot be cancelled for duress in that the agent threatened litigation on account of his discharge and the appointment of a receiver, at a time when the company was in disfavor, where the parties dealt at arm's length, both had the advice of counsel, the compromise was ratified by the directors of the company, and no demand was made or steps taken to cancel the notes until after the lapse of six months; a threat of litigation or buying one's peace not ordinarily being duress.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered July 3, 1908, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to cancel promissory notes, and for damages. Affirmed.

F. E. Holloway (*John D. Fletcher* and *Ellis, Fletcher & Evans*, of counsel), for appellant.

Rufus J. Burtlehaus and *Emmett N. Parker*, for respondents.

CHADWICK, J.—Prior to January 26, 1907, defendant Charles H. Spencer was engaged in the insurance business in the city of Seattle, where he controlled and operated the Merchants Fire Association. About that time C. K. Holloway and others had organized the Walla Walla Fire Insurance Company, with its principal place of business at Walla Walla. The latter company was in need of a manager experienced in the promotion of new insurance companies. After some negotiations, extending over a period of some

¹Reported in 100 Pac. 741.

six weeks, appellant bought the business of the Merchants Fire Association, assumed its outstanding risks, and as a part of the transaction, employed Charles H. Spencer as its secretary. As an inducement to the trade, fifty shares of stock were issued in the name of the defendant Ellen M. Spencer, and delivered to defendant Charles H. Spencer, who held it for her. On February 1, 1907, Spencer assumed his duties as secretary of the appellant company at Walla Walla. The business of the company seems to have progressed to the satisfaction of all parties. On June 13, 1907, the company, being desirous of extending its business throughout the middle western states, entered into an agreement with Charles H. Spencer, wherein it was stipulated that the company would open a branch office at the city of Chicago, and that Spencer should be the manager and receive a salary of \$5,000 during the life of the contract, which terminated on the 30th day of June, 1917. It was also agreed that, in consideration of the cancellation of the contract theretofore existing between the parties, Spencer should receive the sum of \$5,000 in addition to his salary and expenses from the 1st day of July, 1907, to January 1, 1908. It was further provided that default on the part of Spencer, "in the performance of any of his duties, conditions or limitations herein agreed and undertaken, shall be deemed as good and sufficient cause for the termination of this agreement by the first party, who shall and does hereby reserve the option in such instance to terminate and annul this contract in case the party of the first part elects so to do." There was also a stipulation in the contract that Spencer should have the sole right to hire and discharge all necessary help.

At the time the contract was entered into, Mr. Holloway, the managing director of the plaintiff, had some oral understanding with Spencer that he would not employ his son, L. E. Spencer, in any capacity whatever, in or about the business to be established at Chicago. After Spencer had opened his office in Chicago, he wrote Holloway, saying that because

Mar. 1909]

Opinion Per CHADWICK, J.

of family reasons he was compelled to break his promise, and had employed his son as a special agent of the company. He further justified himself by reference to his contract, which gave him exclusive right to employ and discharge such help as he desired. After a season of somewhat recriminatory correspondence, Holloway wrote Spencer, saying that his services were dispensed with, and ordering him to turn his office over to another. This letter was not received by Spencer until after the 12th day of October, 1907. It had been addressed to Spencer at Seattle, where he then was attending to some litigation against the Merchants Fire Association. Spencer arrived in Walla Walla on the 12th day of October, when he learned for the first time that he had been discharged. Spencer insisted that he be paid the value of his contract, and for fifty shares of the capital stock of the company then standing in the name of respondent Ellen M. Spencer. After some negotiations, a contract was drawn up and signed by the parties, wherein it was agreed that, in full compromise of all differences, plaintiff would pay to Spencer the sum of \$5,000 in cash, and \$15,000 to be paid in six, nine, and twelve months after date, for which plaintiff executed and delivered its three certain promissory notes for \$5,000 each. This action was brought to cancel the notes and to recover damages. From findings of fact and decree in favor of defendants, plaintiff has appealed.

The ground upon which appellant bases its claim for cancellation of the agreement of October 12, 1907, and the notes executed in accordance therewith, is that the respondent Charles H. Spencer fraudulently took advantage of the then situation of the company—appellant was in disfavor with the insurance departments of several states, and was the subject of hostile criticism by the insurance press of the East—by threats of litigation, and that he would immediately proceed to put the company in the hands of a receiver if it did not execute and deliver the notes now sought to be cancelled.

No useful purpose would be served by a critical review of

the testimony. It is enough to say that, according to the statements of the company published about the time the contract was entered into, the contract and stock of the respondents was of considerable value. Both parties had ample opportunity to consult counsel, and both were advised. They were dealing at arm's length. The compromise agreement was not hastily entered into. The terms of settlement were considered and ratified by a part of the directors of appellant on October 12; and later, some question having been suggested by the attorney for Mr. Spencer as to the formality of the meeting of the directors on October 12, a meeting was held on October 16, when the matter was again before the board of directors, and the following proceedings were had:

"Minutes of special meeting of the board of trustees of the Walla Walla Fire Insurance Company held at the office of the company at 2:00 p. m., Wednesday, October 16, 1907.

"The meeting was an adjourned meeting called by the president pursuant to a notice given in the manner provided in the by-laws of said company on Saturday, October 12, 1907, for Tuesday, October 15th. There being no quorum present at the hour fixed for said meeting, upon motion, said meeting was duly adjourned until October 16, 1907, at the hour of 2:00 p. m., and notices of said adjourned meeting were mailed upon order of the vice president to all of the trustees at their last known postoffice address. The president called the meeting to order with trustees Barnett and Smalley in attendance, and upon motion duly seconded, the board ratified the action of the meeting of trustees held on Oct. 12, 1907, approving the execution on the part of the president and assistant secretary of the contract, which is fully set out in the minute record of the company on pages No. 34 and No. 35 thereof. On motion duly seconded, the trustees further approved the minutes of the meeting of trustees, held on Oct. 12, 1907. On motion duly seconded, the minutes of this meeting as read by the assistant secretary were approved."

The new agent in Chicago was advised that all differences with Spencer had been adjusted. The money was paid to Spencer and the notes delivered in consideration of the sur-

Mar. 1909]

Opinion Per CHADWICK, J.

render of the contract of June 13, 1907, and Mrs. Spencer's stock at Chicago, on October 23, ten days after the contract had been entered into. This action was brought April 7, 1908. Between October and April appellant took no steps to undo the wrong it now asserts, and prior to the commencement of this action made no demand on Spencer. Under these circumstances it is elementary that a contract cannot be avoided on the ground of duress.

Appellant relies principally upon the case of *Rose v. Owen* (Ind. App.), 85 N. E. 129. That case is in some respects very like the one before us. It in our judgment carries the rule beyond reasonable limits. The learned judge who wrote the opinion, after stating the law as follows:

"The injury feared would result if the receivership action was instituted regardless of the merits of the case. Whatever defenses appellee or said company might have would be unavailable to avert the threatened injury since it must result before such defense could be interposed;"

says:

"A contract made under duress is voidable at the election of the party coerced, provided the contract be not ratified, and the election is made within a reasonable time."

The proviso he makes should have been applied as the law of the case, for the transaction which then engaged his attention was certainly ratified, not as completely, but as effectually as the contract was ratified in this case. Dangerous, indeed, would be the doctrine that contracts could be repudiated at will, when entered into by competent and capable men of comprehensive experience and sound judgment. If, in fact, they became the victims of duress, they cannot at the same time ratify, and bide their pleasure to disavow their act. A threat of litigation by one who has a legal right to sue, is not generally held to be duress within the meaning of the law. Certainly Spencer had the privilege of litigating the right of appellant to break its contract. All compromise contracts partake to a greater or less extent of coercion. The one party or the other will yield his contention to avoid a law-

suit. To buy one's peace is not duress within the ordinary definition of the term.

"Duress is that degree of severity, either threatened and impending, or actually inflicted, which is sufficient to overcome the mind and will of a person of ordinary firmness." 2 Greenleaf, Evidence, § 301.

The record shows that appellant acted, not because of duress but voluntarily, and that the settlement was regarded at the time as beneficial. The following authorities sustain our conclusion: *McClair v. Wilson*, 18 Colo. 82, 31 Pac. 502; *Holt v. Thomas*, 105 Cal. 273, 38 Pac. 891; *Silliman v. United States*, 101 U. S. 465, 25 L. Ed. 987; *Hackley v. Headley*, 45 Mich. 569, 8 N. W. 511; *Hilborn v. Bucknam*, 78 Me. 482, 7 Atl. 272, 57 Am. Rep. 816; *Heysham v. Dettre*, 89 Pa. St. 506.

The judgment is affirmed.

RUDKIN, C. J., MOUNT, CROW, FULLERTON, and GOSZ, JJ., concur.

DUNBAR, J., took no part.

PARKER, J., having been of counsel, took no part.

Apr. 1909]

Opinion Per FULLERTON, J.

[No. 7220. Decided April 1, 1909.]

ELMIRA L. STONE, *Appellant*, v. ELLEN M. MARSHALL *et al.*,
Respondents.¹

JOINT TENANCY—PUBLIC LANDS—PATENT AFTER ABOLISHMENT—HUSBAND AND WIFE—COMMUNITY PROPERTY—DESCENT AND DISTRIBUTION. A tract of land patented by the United States government to two married men in the state of Washington, after the enactment of the community property law of this state, is the common property of the parties and their wives, and is not held under a joint tenancy, with the right of survivorship, and upon the death of one of the patentees, his interests descend to his wife and children under the laws of descent, and not to the surviving owner.

TENANCY IN COMMON—TAXATION—REDEMPTION—PURCHASE OF CERTIFICATE BY CO-OWNER. The purchase of a tax certificate by a joint owner of land, has the effect of redemption from the tax sale, and inures to the benefit of the co-owners.

SAME—PAYMENT OF TAX BY CO-OWNER—LIEN. A co-owner, by payment of taxes against the entire estate, acquires a lien for a just proportion of the taxes paid, but cannot acquire a tax title to the exclusion of co-owners.

EQUITY—ESTOPPEL—LACHES—QUIETING TITLE. The claim of laches in bringing an action to quiet title cannot be made by a co-owner who knew that the plaintiffs were in ignorance of the title and interest of their ancestors, and who never took any possession of the land or gave any notice of his claim thereto.

Appeal from a judgment of the superior court for King county, Neterer, J., entered August 15, 1907, upon findings in favor of the defendants, after a trial on the merits, in an action to quiet title. Affirmed.

Ballinger, Ronald, Battle & Tennant (J. L. Corrigan, of counsel), for appellant.

Eugene A. Childe, for respondents.

FULLERTON, J.—On May 2, 1870, the United States patented to S. B. Hinds and C. P. Stone, under the act of Congress of April 24, 1820, entitled "An act making further provision for the sale of public lands," forty acres of land

¹Reported in 100 Pac. 858.

in King county, described as "the northwest quarter of the southeast quarter of section two, in township twenty-three, north of range three east in the district of lands subject to sale at Olympia, Washington Territory." At the time of the issuance of the patent, both Hinds and Stone were married men, living with their wives at Seattle, in the then territory of Washington. Hinds died intestate on December 14, 1870, without having conveyed or otherwise disposed of his interest in the property. He left as his heirs at law his widow and three daughters, the eldest of the daughters being then seven years of age. The widow and daughters removed from Seattle to the state of California shortly after the death of Mr. Hinds, and never after that resided in the territory or state of Washington. Mrs. Hinds, after her removal to California, married one J. H. Marshall, with whom she lived until her death on December 8, 1892. Mrs. Marshall left no heirs other than the daughters of herself and Mr. Hinds, above mentioned, and to these daughters she devised her property. It does not appear from the record, however, that she had any knowledge of her first husband's interest in the land in question here. The patent was in the possession of C. P. Stone until it was recorded at his request in the auditor's office of King county on April 15, 1904, long after her death. Neither of the daughters had any actual knowledge of the existence of the patent, or of their father's interest in the property described in it, until after the commencement of this action.

Mr. Stone was divorced in 1872 from the wife he had at the time of the patent, and married the appellant some two years thereafter. The land at the time of its purchase by Stone and Hinds was unoccupied timber land, and has never been in the actual occupancy of any one. All of the acts of ownership that have been exercised over it subsequent to the death of Mr. Hinds were exercised by Mr. Stone. He sold the timber growing upon it at one time, and it is in evidence that he occasionally visited the place, but no perma-

Apr. 1909]

Opinion Per FULLERTON, J.

nent improvements, or improvements of any kind, were ever placed thereon by him, or any one. It was assessed for taxes in 1882 as the property of "Hinds & Stone," and sold for nonpayment at the annual sale of lands for delinquent taxes for the year 1893. One W. H. Gleason became the purchaser of the property at the sale, and received a certificate of purchase to that effect. On November 12, 1890, he assigned the certificate to one A. E. Hanford, who the next day assigned the same to C. P. Stone. From that time until the year 1905 the land was assessed to C. P. Stone and he paid the assessments annually. The record fails to show any assessments for other years. No demand was ever made by C. P. Stone on the heirs of S. B. Hinds for their proportion of the taxes due, nor did they voluntarily offer to pay any part thereof until after the commencement of this action, when they tendered a sum equivalent to one-half of the amount so paid.

C. P. Stone died testate in Seattle, September 14, 1906, and thereafter letters testamentary were issued to his widow, Elmira L. Stone. Mrs. Stone thereupon brought this action in her own right and as the executrix of her husband's estate to quiet title to the lands described, averring that the property was acquired by her husband and herself by purchase on November 14, 1890, and that the same became and was their community property; further averring that the respondents claimed some interest therein as the heirs at law of S. B. Hinds, which constituted a cloud upon her title. Issue was joined on the complaint, and a trial was had which resulted in findings to the effect that the respondents were the successors in interest of S. B. Hinds, and the owners of an undivided half of the property; that the tax title of the appellant was invalid and a cloud upon the respondents' title; that the respondents were not guilty of laches; but that the appellant was entitled to contribution for one-half of the taxes paid, and entered a decree accordingly. This appeal is from that decree.

The first contention of the appellant is that the patent from the United States to S. B. Hinds and C. P. Stone created in them an estate in joint tenancy, with all the incidents such an estate had at common law, including the right of survivorship, and that, in consequence, Stone succeeded to all of the interest Hinds had in the property at his death, leaving no interest therein to pass to his wife or to be inherited by his heirs. In support of their contention, counsel call attention to the earlier territorial statutes which expressly refer to estates held in joint tenancy, and to the statute of 1885, by which the right of survivorship in such estates was expressly abolished. But without following the argument in detail, we are clear that the interest of Hinds in these lands at the time of his death did not descend to Stone by right of survivorship. The lands were acquired by Stone and Hinds after the enactment of the community property statutes, or common property statutes as they were then called; and the land when purchased became the common property of Stone and Hinds and their wives, and was never held by them in joint tenancy. Laws 1869, 318; 5 U. S. Stat. at Large, p. 566. On the death of Hinds, therefore, his interest in the land passed to his widow and children under the statute of descents of the then territory of Washington, and did not pass to his co-purchaser named in the patent.

It is next insisted that Stone acquired all the interests of the respondents by virtue of his purchase of the tax certificate after the land had been sold for delinquent taxes. But this purchase was in effect nothing more than a redemption from a tax sale, and inured to the benefit of all of the co-owners.

"It is a general rule, founded on the requirements of good faith, that any one interested in land with others, all deriving their titles from a common source, cannot acquire an absolute title to the land by a tax deed, to the injury of the others." *Woodbury v. Swan*, 59 N. H. 22.

See, also, *Shepard v. Vincent*, 38 Wash. 493, 80 Pac. 777:

Apr. 1909]

Opinion Per FULLERTON, J.

Finch v. Noble, 49 Wash. 578, 96 Pac. 3. Doubtless under the rule in this state, Stone by the payment of the tax assessed against the entire estate acquired a lien on the respondents' interests for their just proportion of the taxes so paid, which he could have foreclosed by a suit in equity; *Burgert v. Caroline*, 31 Wash. 62, 71 Pac. 724, 96 Am. St. 889; *Spokane v. Security Savings Society*, 46 Wash. 150, 89 Pac. 466; but he could not and did not acquire the respondents' interests by suffering the land to go to sale for the taxes and buying the land at the tax sale.

The appellant further contends that the respondents' claim to their father's and mother's interest in this land is stale and iniquitable. This contention is based upon the fact that no assertion of right in the property was made by the respondents from the time of their father's death until after the commencement of the action. But the appellant is not in a position to assert this fact as a bar to the respondents' interests, even were the plea available if made by a stranger. The appellant and her husband, knowing, as they must have known, that the respondents were ignorant of their interests in this property, owed them the duty either to inform them directly of their interests, or take such open and notorious possession of the property as to make it clear that they were claiming against all the world; and in the absence of proof that they did one or the other of these things, a court of equity will not allow them to appropriate the respondents' interests because of delay on the respondents' part in asserting such interests. There was here no possession at all on the part of the appellant or her testator, much less was there such a possession as would of itself imply an adverse holding of the property. *Cox v. Tompkinson*, 39 Wash. 70, 80 Pac. 1005.

The judgment appealed from is affirmed.

ALL CONCUR.

[No. 7356. Decided April 1, 1909.]

COAST LAND COMPANY, *Appellant*, v. THE CITY OF SEATTLE
et al, *Respondents*.¹

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—ASSESSMENTS—STATE LANDS—LEASEHOLDS—STATUTES—CONSTITUTIONAL LAW—DUE PROCESS. Laws 1907, p. 123, providing for the assessment of the entire fee of state lands benefited by local improvements, and if the same has been leased, that the leasehold interest may be sold to satisfy the entire assessment, is void, as depriving the lessee of his property without due process of law.

SAME. Such an assessment cannot be sustained in a given case where only the leasehold interest was benefited by the improvement, since the lessee has not had his day in court to question the benefits, where the assessment was not made against the leasehold.

SAME—SALE OF LEASEHOLD TO SATISFY ASSESSMENT AGAINST FEE. Laws 1905, p. 267, providing for the assessment and sale of the leasehold of state lands as a separate entity, when benefited by a local improvement, cannot be invoked to sustain a sale of leasehold interests under an assessment of the entire fee.

Appeal from a judgment of the superior court for King county, Warren, J., entered March 24, 1908, in favor of the defendants, upon sustaining a demurrer to the complaint, dismissing an action to quiet title. Reversed.

Geo. McKay, for appellant.

Scott Calhoun and *Howard A. Hanson*, for respondents.

FULLERTON, J.—On November 1, 1900, the state of Washington, being then the owner of lots 2 and 3, in block 240, of the official plats of the Seattle tide lands, leased the same to one Wm. P. Trimble for a term of 29 years, at a rental of \$8 per year. Mr. Trimble continued to hold the lease until September 16, 1907, when he assigned the same, with the written permission of the state, to the appellant in this action.

Subsequent to the execution of the lease, the legislature passed an act authorizing the assessment of lands owned by the state and leasehold, and other contractual and possessory

¹Reported in 100 Pac. 856.

Apr. 1909]

Opinion Per FULLERTON, J.

interests in such lands, by cities of the first class, for local improvements which specially benefit such lands and interests. The method of collecting the assessment made against the leasehold, contractual, or possessory interests is not made clear by the act, but presumably it was intended to permit the sale of such interests for nonpayment of the assessment, as property owned in fee is sold when the assessment is not paid. As to the assessment against lands owned by the state, it was provided that the amount thereof assessed against each particular lot should be certified to the commissioner of public lands, who should charge the same against such lot and certify the amount to the state auditor, who in turn should certify to the legislature the amount of such local assessments charged against such lands of the state, and that the legislature should provide for the payment of the same, with interest, by appropriation out of the general fund of the state. Laws 1905, p. 267.

The legislature of 1907, passed the following act:

"Section 1. Any city of the first class in the state of Washington is hereby authorized and empowered to include within any local improvement district formed by it the whole or any part of any land in school sections or tide lands, title of which remains in the state of Washington; and said city is authorized and empowered to assess the cost of any local improvement against any such tide or school land in the same manner as if the same were private property: *Provided, however,* That the interest of the state in such property shall not be sold to satisfy the lien of such assessment, but only such interest, or contract or other right therein as may be in private ownership shall be subject to such sale.

"Sec. 2. Whenever any such tide or school land situated within the city limits of any city of the first class has been included within any local improvement district by such city, and the contract, leasehold or other interest of any individual therein has been purchased to satisfy the lien of such assessment for local improvement, the purchaser of such interest at such sale shall be entitled to receive from the state of Washington, on demand, a conveyance of the property purchased by him upon the payment to the state of the

amount of balance which his predecessor in interest was obligated to pay.

"Sec. 3. Where the state has made no lease or contract, or has granted no right with reference to any such lands or any part thereof, against which an assessment has been made for local improvements, the state shall at the next session of the legislature after such improvement is made, if it still owns the land, appropriate sufficient money to pay for such improvements, or the person entitled to such money may apply to the proper state officers to have such lands sold in the manner provided by law, and if the said lands have not been appraised, the state land commissioner shall, upon said application being made, cause the same to be appraised, and the assessment for such improvement shall be added to the appraised valuation of all such tracts owned by the state, and such land commissioner shall cause the sale of such lands to be made in the manner provided by law, but no sale shall be made for less than the appraised value, plus the assessment, against the tract to be sold. When such lands are sold, the proper state officers are authorized to pay to the party entitled to receive the same, the amount or amounts of said assessments for local improvements." Laws 1907, p. 123 *et seq.*

On May 13, 1907, the city council of the city of Seattle, by resolution passed pursuant to the ordinances of that city, directed the improvement of Colorado street, by the construction of a plank roadway and wooden sidewalk along the same, at the cost of the property benefited by such improvement. Due proceedings were had thereunder resulting in an assessment against lot 2 of the leased land in the sum of \$466.72, and lot 3 in the sum of \$466.72. No attempt was made to assess the leasehold interest belonging to the appellant as a separate entity from the fee in the lot, nor was it indicated what portion of the assessment made was intended to be made a charge upon such interest. The city authorities thereafter proceeded to collect the assessment by selling the appellant's leasehold interest. Thereupon the appellant began the present action to restrain them from so doing, and to have the assessment declared void as a cloud upon his title.

Apr. 1909]

Opinion Per FULLERTON, J.

To a complaint setting forth the foregoing facts, a demurrer was interposed and sustained. The appellant elected to stand on its complaint, and refused to plead further, whereupon judgment was entered against it dismissing its action.

A number of questions are suggested by the assignments of error and discussed in the briefs of counsel, but the conclusion we have reached on the principal question involved renders it unnecessary to review the others. It is contended, we think rightly, that the method of collecting the assessment provided for in the statute of 1907 above quoted is void, as its enforcement would deprive the leaseholder of his property without due process of law. The statute provides, it will be observed, for the assessment of land belonging to the state benefited by local improvements as if the same were private property, and when the land has been leased, that the leasehold interest may be sold to satisfy the entire assessment. The legislature may authorize the assessment of a leasehold interest for a local improvement in so far as the leasehold interest is benefited by the improvement, and may provide for a sale of the leasehold to satisfy the lien of the assessment; in fact we have so held in *Rabel v. Seattle*, 44 Wash. 482, 87 Pac. 520; but clearly a leasehold interest cannot be sold to satisfy an assessment against the entire fee. In so far therefore as the statute of 1907 purports to provide for such a sale it is void.

The respondents argue, however, that the rule should not apply to the instant case for the reason that here the only interest benefited by this improvement is the leasehold interest. But it is a sufficient answer to this to say that the appellant has never had its day in court on this question. Inasmuch as the assessment was not made against its interest, but is made upon the entire property, it was not called upon or given an opportunity to contest whether its interest in the property was the sole interest benefited, and it must be given this opportunity before the charge is irrevocably fixed against its interest.

The respondents are not aided by the statute of 1905. That statute required an assessment against the leasehold interest as a separate entity, and no such assessment was made. If we should hold, therefore, that the statute of 1907 was void in toto, we could not hold that this assessment was authorized by the statute of 1905.

The judgment is reversed, with instruction to reinstate the case and require the defendants to answer over.

RUDKIN, C. J., MOUNT, CROW, and DUNBAR, JJ., concur.
CHADWICK, GOSE, MORRIS, and PARKER, JJ., took no part.

[No. 7437. Decided April 1, 1909.]

THOMAS BOWERS *et al.*, *Appellants*, v. CHARLES W. GOOD
et al., *Respondents*.¹

APPEAL—REVIEW—PLEADING—AMENDMENTS AT TRIAL—PREJUDICE. Error cannot be predicated upon allowing a trial amendment raising a new issue by an affirmative defense, unless the plaintiff makes a showing of prejudice.

PLEADING—INCONSISTENT DEFENSES. In an action for breach of contract to convey land, a denial of the contract as alleged and affirmatively setting up an oral contract of sale and its avoidance, is not inconsistent with an earlier general denial.

COMPROMISE AND SETTLEMENT—VENDOR AND PURCHASER—MUTUAL RESCISSION—SURRENDER OF CONTRACT—FRAUD—EVIDENCE—SUFFICIENCY. The evidence is sufficient to sustain findings that purchase money returned, with interest and ten dollars additional, was in complete settlement of rights under a rescinded contract of purchase, without fraud, where it appears that the money was received while the parties were dealing at arm's length, and the vendors only stated their views of the vendee's rights under the contract, under circumstances disclosing their motives.

HUSBAND AND WIFE—COMMUNITY PROPERTY—CONTRACTS BY WIFE—AUTHORITY. A husband cannot object to his wife's want of authority to surrender a contract for the purchase of community property which he permitted her to enter into.

¹Reported in 100 Pac. 848.

Apr. 1909]

Opinion Per FULLERTON, J.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered March 10, 1908, upon findings in favor of the defendants, after a trial before the court without a jury, in an action for damages for the breach of a contract to convey real estate. Affirmed.

Southard, Brown & Murphy, for appellants.

T. N. Tallentire and Farrell, Kane & Stratton, for respondents.

FULLERTON, J.—In 1905 the appellant Elizabeth Bowers and the respondents, acting through their agent, one Julia A. Underwood, entered into an oral contract whereby the appellant agreed to buy, and the respondents agreed to sell, a certain tract of land, situated in King county, for a consideration of \$700. At the time of making the contract, Mrs. Bowers paid upon the purchase price the sum of ten dollars. Mrs. Bowers and the agent, who seemed to have made the contract in the absence of third persons, disagree as to its precise terms, but it appears that Mrs. Bowers made small payments on the purchase price from time to time, which aggregated on September 6, 1906, the date on which the last payment was made, the sum of \$100. Nothing further was done in the matter until March, 1907, when the respondent Charles W. Good waited upon Mrs. Bowers and told her that he could wait no longer for the balance of the purchase price. This call was made upon Friday, March 1. 1907, and Mrs. Bowers desired him to give her until the next Monday in which to raise the money. This he refused to do, but, as she testifies, did agree to give her until the next day at noon. She further testifies that she appeared at his office on the next day at noon with the money, when Good refused to receive it, declaring that he would not carry out the contract. On March 4 thereafter, all money paid by Mrs. Bowers, and ten dollars additional, was returned to her in settlement of her rights under the contract.

This action was begun by Mrs. Bowers and her husband in May, 1907, to recover damages for the breach of the contract of sale. To a complaint alleging the contract and its breach, the respondents first answered by a general denial: but on the day the case was called for trial, they obtained permission and filed, over the appellants' objection, an amended answer, in which they denied the contract as alleged by the plaintiffs, and set up affirmatively an oral contract of sale, the failure of the plaintiffs to perform, and its subsequent settlement and release. To this a reply was filed, averring that the money returned to Mrs. Bowers, and alleged to be in settlement of the contract between the parties, was so returned without the knowledge or consent of her husband, and against the will of Mrs. Bowers, she being induced to accept the same by false and fraudulent representations made to her by Mr. Good and his agent Mrs. Underwood. On the issues thus made, a trial was had before the court without a jury, resulting in findings and a judgment in favor of the respondents.

It is first assigned that the court erred in permitting the amended answer to be filed on the day the cause was set for trial. It is said that the answer introduced a new issue in the case, one upon which the plaintiffs did not come prepared to try, and that the affirmative matter in the answer was inconsistent with the denials. But we do not think either of the objections are well taken. The statutes permitting amendments to pleadings were enacted in the furtherance of justice, and under them amendments are properly allowed at any stage of the case, when to allow them will not operate to the prejudice of the opposing party. The fact that the amendment may introduce a new issue is not alone grounds for denying it. The true test is found in the answer to the question, is the opposing party prepared to meet the new issue. His remedy, therefore, when a new issue is sought to be presented by an amendment, is not to object to it merely, but to show in addition that he is unprepared to meet the

Apr. 1909]

Opinion Per FULLETON, J.

new issue. In such case, the trial court will, in its discretion, either continue the case in order to allow him to prepare for trial of the new issue, or deny the right to amend. This question was presented in the case of *Daly v. Everett Pulp & Paper Co.*, 31 Wash. 252, 71 Pac. 1014, where the court said:

"This court has heretofore construed the statute as intending much liberality in the matter of amendments in furtherance of justice. In *Barnes v. Packwood*, 10 Wash. 50 (38 Pac. 857), three amended answers had already been filed, and at the time of the trial the court permitted a fourth to be filed. The court observed at page 52 as follows: ' . . . the court having such a large discretion under our law and practice in matters of amendments, we do not think we would be justified in reversing the case for this reason.' The record does not disclose any claim on the part of appellant that he was really injured by the amendment, and unprepared with testimony to meet any issue tendered thereby. No application for continuance of the trial on the ground of surprise or inability to produce testimony is shown. If such had been made to appear, no doubt, the trial court would have granted the amendment upon such terms as would have fully protected any rights shown to be jeopardized by permitting the amendment at that time. We think reversible error is not shown in permitting the amended answer to be filed."

See, also, *Helbig v. Grays Harbor Elec. Co.*, 37 Wash. 130, 79 Pac. 612; *Smith v. Michigan Lumber Co.*, 43 Wash. 402, 86 Pac. 652.

Nor were the defenses inconsistent. "Defenses are inconsistent only when one fact contradicts the other; where there is only a seeming and logical inconsistency, which arises merely from a denial and a plea in confession and avoidance, such defenses are not inconsistent." *Irwin v. Holbrook*, 32 Wash. 349, 73 Pac. 360; *Davis v. Seattle Nat. Bank*, 19 Wash. 65, 52 Pac. 526; *Loveland v. Jenkins-Boys Co.*, 49 Wash. 369, 95 Pac. 490.

On the merits of the controversy, the court found that the respondents had returned to the appellants the several pay-

ments that had been made to their agent for them with interest, and,

"That said money so returned by the defendants was returned to them and paid over to them on or about the 4th day of March, 1907, in full satisfaction and settlement of all dealings theretofore had between the plaintiffs and defendants on account of said lot, and on account of the moneys paid by plaintiffs to defendants' agent as aforesaid, and that said sum of money was accepted by said plaintiffs in full settlement and liquidations of all transactions theretofore occurring between the parties hereto on account of said lot, and that at the time of said settlement, the said plaintiffs absolutely released and discharged said defendants from any claims or demands that said plaintiffs, or either of them, might or did have against the defendants on account of any transaction relating to said lot, and at the time of said payment to plaintiffs of the money theretofore paid, with interest, all contracts or agreements relating to said lot were by mutual consent and for a valuable consideration rescinded, cancelled and held for naught."

The appellants contend, however, that the settlement was induced by conspiracy and fraud on the part of Good and his agent, but in our opinion the evidence does not support this contention. Mrs. Bowers' testimony shows that they did no more than state to her their views of her rights under the contract of sale, and this at a time after differences had arisen between them, and while the parties were dealing at arm's length, and when she had reason to suspect their motives if they were other than honest. Under these circumstances, we think it too much to say that Mrs. Bowers was either misled by the respondents or coerced by them into doing something against her will.

It is urged also that Mrs. Bowers was without authority to make a settlement of the rights acquired by herself and her husband without her husband's express assent, because the interest acquired by her in the land was community property. But we think the husband is estopped from raising this question. In this state the management and control of

Apr. 1909]

Syllabus.

community property is vested in the husband, and the wife cannot, without his consent, make any valid contract with reference thereto, unless it be for necessities for herself or the family. When, therefore, the husband knowingly permits the wife to deal with the community property, his consent to her acts and all of her acts is implied, and he cannot afterwards hold to those which redound to his benefit and repudiate those which are against his interest. He must accept the contract as an entirety, or repudiate it as an entirety, and in this instance he will not be permitted to say that his wife had authority to contract for the land, but did not have authority to settle and relinquish any right acquired thereunder. The judgment is affirmed.

ALL CONCUR.

[No. 7449. Decided April 1, 1909.]

ELLEN TRUELLE BALAM, *Appellant*, v. FRANK ROULEAU
*et al., Respondents.*¹

CANCELLATION OF INSTRUMENTS—DEEDS—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY. There is no evidence that undue influence, induced a conveyance of real and personal property, reserving a life estate in the land, in consideration of an agreement for support and pin money during the life of the grantors, where it appears that one of the grantors was sick and 70 or 80 years old, and executed the agreement after long consultation with three of his lifelong friends, prominent business men, who had no interest in the matter, and the same was carefully explained to his wife, a half-breed Indian, who was not coerced in any way and fully understood the matter, if capable of doing so.

SAME—CONSIDERATION—ADEQUACY. A conveyance by an old couple of a farm of the value of about \$2,000 or \$3,000, and \$700 worth of farm implements and personal property, to the husband of a niece, who was their sole beneficiary in a will, is not void for inadequacy of consideration, where a life estate in the land was reserved, and the grantee agreed to work the place and share the profits in the chickens, board and lodge the grantors and the survivor for life, and pay a certain small monthly sum; especially where three prominent business men, friends of the grantors, advised the arrangement.

¹Reported in 100 Pac. 833.

Appeal from a judgment of the superior court for San Juan county, Joiner, J., entered December 6, 1907, upon findings in favor of the defendants, in an action to cancel a deed. Affirmed.

H. E. Peck, for appellant.

A. J. Craven and *W. R. Garrett*, for respondents.

FULLERTON, J.—In this action the appellant sought to cancel and set aside a deed and bill of sale, executed by herself and her former husband, one Isaiah Pappillion, conveying to the respondent, Frank Rouleau, certain real and personal property. The real property in question is farming land, and was acquired by the appellant and her husband under the land laws of the United States. The personal property consisted of farming implements and machinery and live stock. The instruments in question were executed on May 3, 1904. At that time the appellant and her then husband were residing on the land, and had so resided thereon for many years. The appellant is a half-breed Indian, and at the time of the execution of the deed and bill of sale was upward of 60 years of age. Her husband was of French extraction, and was at that time between 70 and 80 years old. The husband had been ill for some time, and evidently feared that he was near dissolution. The deed and bill of sale were evidently executed with the idea of preserving the property for the use of the appellant for the time she should survive her husband. The deed reserved a life estate in the land conveyed to the grantors and to the survivor of them.

The bill of sale contained certain promises and agreements which expressed the real consideration for the conveyances, and may be summarized as follows: (1) The grantee undertook to pay to the grantors for the remainder of their natural lives and for the life of the survivor of them fifteen dollars per month; (2) to pay all taxes and other legal assessments then due or to become due upon the property conveyed to him; (3) that the poultry then on the premises and thereafter

Apr. 1909]

Opinion Per FULLERTON, J.

to be kept thereon should belong share and share alike to each of the parties, and the profits arising therefrom should be divided equally between them; that such poultry should have the freedom of the premises and be fed and cared for from the products of the premises as is usual and customary; (4) that certain rooms in the house should be reserved for the sole use and occupation of the vendors or the survivor of them; and so long as they together or either of them singly resided therein, the vendor should furnish them with wholesome and adequate board, the same as he provides for his own family, at the rate of twelve dollars per month while both should live and six dollars per month during the life of the survivor; (5) that should the wife survive the husband and should not be content to live in the house with the vendee, then he should build for her a good substantial two-room dwelling house, not less than 12x24 feet in size, at any point along the east side of a designated tract that she should select, which house, together with an acre of land surrounding the same, she should have for her own private residence free from rent, taxes, charges or interferences of any kind; (6) that after she should become domiciled in such house, the vendee should pay her thereafter ten dollars per month in lieu of all other obligations mentioned in the agreement.

Isaiah Pappillion died on May 5, 1904, the second day after the agreement had been executed. The appellant continued to reside with the respondent on the farm until October 9, 1904, when she married one John Balam, and took up her residence with him at another place. Rouleau made the payments to her provided in the contract until August 1907, when the present action was begun to set aside the conveyances, as above stated. No contention is made, either in the pleadings or the evidence, that Rouleau has not performed the covenants of the agreement; but it is alleged, and it was sought to be proven at the trial, that both Pappillion and the appellant were induced to execute the instruments of conveyances by undue influence exercised by Rouleau and certain

other persons who desired Rouleau to have the property; it being contended also that the consideration for the conveyances was grossly inadequate. The court, after hearing the evidence, found that no undue influence had been practiced on the parties and that the consideration was fair and just, and entered a judgment to the effect that the plaintiff take nothing by her action.

On the question of undue influence, it seems to us that the evidence utterly fails to show that either the appellant or her husband were in any manner overreached. The scheme originated with Pappillion himself. Before executing the instruments he called to his bedside three of his lifelong friends, one of whom was his family physician, another a county commissioner of the county in which he lived, and a third a prominent business man, all of them men of character and capacity, and all of them without other interest in the matter than that of friendship for the aged couple. To these Pappillion stated his desires and the scheme finally adopted was only arrived at after a long consultation during which the appellant was present, and at which great pains were taken to make her know and understand what was going on and what was desired. While Pappillion was at that time both aged and ill, all of the witnesses agree that his mind was clear, and that a variety of schemes were discussed with him before this one was adopted. The evidence leaves but little doubt that he fully understood and fully consented to the entire proceeding. As to the appellant, while the evidence is not so clear, we do not think she was in any manner misled. She was unlettered, and somewhat unfamiliar with the English language, and accustomed to rely in matters of business largely on her husband's judgment; yet, as we say, great pains were taken, both when the agreement was being talked over and when the papers were executed, to make her know and understand them. There is no evidence of any attempt to overreach her. If she did not understand the purport of the proceedings it was because she was incapable of doing

Apr. 1909]

Opinion Per FULLERTON, J.

so, as the attempt was to make the facts known to her, not to conceal them from her. We believe she fully understood them.

As to the consideration, the evidence is not as full as we would like to have found it. The tract of land conveyed contained some 140 acres. It was all farm land, only 45 acres of which was at that time cleared and capable of being cropped. A witness, the only one who seems to have testified on the matter, valued the land at from \$2,000 to \$3,000. No witness testified as to the value of the personal property, but it was stated in the defendant's answer to have been worth \$700. Taking these as fair estimates of the value of the property conveyed, it would seem that the price paid was not so grossly inadequate as to require the vacation of the sale as a matter of equity. It must be remembered, also, that the wife of the grantee was a daughter of Pappillion's sister, that he had no children himself, and that Rouleau and his family had been selected by him as the objects of his bounty; in fact, he left a will in which he named Frank Rouleau as his sole beneficiary. Moreover, we feel that the men with whom Pappillion counseled would not have consented to a disposition of the property for a grossly inadequate consideration unless they had been directly commanded to do so by Pappillion himself, and the record is clear that he did not so command.

On the whole record, therefore, we think the judgment should stand affirmed, and it will be so ordered.

RUDKIN, C. J., MOUNT, CROW, and DUNBAR, JJ., concur.

CHADWICK, GOSE, MORRIS, and PARKER, JJ., took no part.

[No. 7559. Decided April 1, 1909.]

GEORGE M. McDONALD, *Appellant*, v. E. C. DOWNING,
Respondent.¹

APPEAL—RECORD—STATEMENT OF FACTS—AFFIDAVITS. The supreme court will not review an appeal from an order quashing a writ of attachment, on a motion based upon affidavits, where the affidavits are not brought up by bill of exceptions or statement of facts.

Appeal from an order of the superior court for Douglas county, Steiner, J., entered May 2, 1908, quashing a writ of attachment, after a hearing before the court. Affirmed.

Geo. M. Ryker and Walter & Bryant, for appellant.

Daniel S. Evans and W. A. Reneau, for respondent.

FULLERTON, J.—The appellant brought an action against the respondent to recover upon certain promissory notes. At the commencement of his action he sued out a writ of attachment and caused the same to be levied upon real property belonging to the respondent. As a part of the attachment proceedings, he also caused a writ of garnishment to be served on Bevis Bros., of Spokane, averring that they were indebted to the respondent, and had money in their possession belonging to the respondent. The respondent appeared in the action and moved to quash the attachment and garnishment, basing his motion upon affidavits filed in court with the motion. On the hearing the attachment was dissolved and the proceedings quashed. The appellant thereupon sued out a writ of garnishment under the statute relating to garnishments, and caused the same to be served upon Bevis Bros. and Evan & Jones, a copartnership, agents for Bevis Bros. The respondent appeared and moved to quash this writ, basing his motion upon all the records and files in the action, and upon the former motion and the affidavits used at the hearing on that motion. The court at the hearing dissolved

¹Reported in 100 Pac. 834.

Apr. 1909]

Opinion Per FULLERTON, J.

the proceedings and quashed the writ. From the order entered to that effect this appeal is taken.

The respondent has moved to dismiss the appeal, basing his motion on four several grounds, none of which do we find to be well taken. No appearance is made to the merits of the action. An examination of the record shows that the order entered below will have to be affirmed on the merits. It was based, as we have shown, upon facts brought to the attention of the trial court by affidavits, and these affidavits are not brought to this court either by a statement of facts or bill of exceptions. This is fatal to their consideration in this court; and without considering them we are unable to say there was error in the order quashing the writ of garnishment. See, *Windt v. Banniza*, 2 Wash. 147, 26 Pac. 189; *Chevalier & Co. v. Wilson*, 30 Wash. 227, 70 Pac. 487; *Griggs v. MacLean*, 33 Wash. 244, 74 Pac. 360; *Taylor v. Modern Woodmen of America*, 42 Wash. 304, 84 Pac. 867.

The order is affirmed, but since the respondent did not appear to the merits of the appeal, no costs will be allowed him in this court.

ALL CONCUR.

[No. 7591. Decided April 1, 1909.]

ROSEMARY McDOUGALL, *Appellant*, v. ROBERT BRIDGES
et al., *Respondents*.¹

APPEAL—NOTICE—PARTIES. Notice of appeal need not be served upon parties not appearing in the court below.

DRAINS—MAINTENANCE—ASSESSMENTS—CONDITIONS PRECEDENT—ESTIMATES—STATUTES—CONSTRUCTION. Under Bal. Code, § 3738, an assessment for the maintenance of a drainage district is void where no estimate was made of the cost, as required by the act.

SAME—PURPOSE OF ASSESSMENT. An assessment for the maintenance of a drainage district is void where part of the assessment was stated to be intended for another purpose than that permitted by the statute, and the assessment was in excess of the amount required for any lawful purpose.

Appeal from a judgment of the superior court for King county, Tallman, J., entered July 10, 1908, upon findings in favor of the defendants, after a trial before the court, refusing to cancel an assessment for the maintenance of a drainage district. Reversed.

Godman & Embree, for appellant.

Ballinger, Ronald, Battle & Tennant, for respondents.

FULLERTON, J.—In this action the appellant sought to restrain the collection of an assessment attempted to be levied upon her property by the drainage commissioners of Drainage District No. 1, of King county. The facts as found by the court are not questioned by either party, and are in substance these: Prior to September 30, 1902, certain freeholders residing in King county, owning land requiring drainage, organized a drainage district under the act of March 20, 1895 (Laws 1895, p. 271) and included therein, among other lands, a tract of land belonging to the appellant which contained 287 acres. Thereafter a drainage system was planned and adopted, and proceedings instituted,

¹Reported in 100 Pac. 835.

Apr. 1909]

Opinion Per FULLERTON, J.

under the provisions of the act, to provide means for the construction of the necessary drains. These proceedings were carried to final decree on October 1st, 1902; in which decree it was found and determined that the cost of the system would approximate the sum of \$29,044.08, and that the benefit accruing to the property of the district as a whole by reason of the improvement would be equal to the sum of \$32,991.08, and that the maximum amount of benefit which would accrue to the appellant's land would be \$2.75 per acre.

After the judgment had been filed in the auditor's office pursuant to the statute, the board of commissioners of the drainage district caused the full amount of the benefits accruing to the appellant's land to be assessed against it, and directed the same to be paid in four equal annual installments, commencing with the year 1902. Thereupon the commissioners entered on the construction of the drains, and in due time thereafter completed the same as planned. The several installments levied against the appellant's land were paid by the appellant as they fell due, the last one being paid prior to May 31, 1906. In October, 1906, the drainage commissioners certified to and filed with the county auditor an instrument in writing by which they attempted to make another assessment against the appellant's property, equal to thirty per centum of the original assessment; the instrument by which the assessment was authorized being in the following words:

"O'Brien, Washington, October 29, 1906.

"Mr. J. P. Agnew, County Auditor of King County, Washington,

"Dear Sir:—At a meeting held by the drainage commissioners of Drainage District No. 1 of King county, you are hereby authorized and empowered to levy and assess upon the tax rolls of King county, thirty per cent of the amount of the judgment in the case of Drainage District No. 1 of King County v. M. J. Hayes et al., No. 32,912, against the property described in said judgment, one-fourth of the thirty

per cent to go on construction fund and three-fourths or the balance to go on maintenance fund. Yours truly, Charles J. Nelson, Secretary Drainage District No. 1."

At the time of this attempted assessment, there were a large number of outstanding warrants issued by the drainage district, but for want of evidence the court did not and could not find the purpose for which they were issued, nor the amount the sum would total. The purpose of the assessment was to pay off the outstanding warrants, and to maintain the drainage system during 1907. The drainage commissioners did not, however, make any estimate of the amount it would require to maintain the drainage system for the year 1907 prior to directing the assessment to be levied, nor did the court find what such cost would be, but it was found that the sum required for that purpose would be less than the amount attempted to be levied. It was further found that the county auditor, on receiving the notice from the drainage commissioners, caused the land of the appellant to be assessed for the amount therein set forth, and the assessment was carried onto the tax rolls of King county as a lawful assessment upon the appellant's property. On the foregoing facts, the trial judge rendered a decree cancelling one-fourth of the assessment, being the part specified in the commissioners' certificate as levied for the construction fund, and held it valid as to the remainder. From the refusal of the court to cancel the entire assessment, this appeal is taken.

The county of King and Matt H. Gormley, as county treasurer of King county, were made parties defendant to the action, but made no appearance in the action, and no judgment was taken against them or either of them. They were not served with the notice of appeal; and counsel for the drainage district move to dismiss the appeal for that reason. But this court has uniformly ruled against this contention. We hold that it is not necessary to serve the notice of appeal on parties who made no appearance in the court below. *Seattle & Montana R. Co. v. Johnson*, 7 Wash. 97, 34

Apr. 1909]

Opinion Per FULLERTON, J.

Pac. 567; *Essency v. Essency*, 10 Wash. 375, 38 Pac. 1130; *Eldridge v. Stenger*, 19 Wash. 697, 54 Pac. 541; *Home Savings & Loan Ass'n. v. Burton*, 20 Wash. 688, 56 Pac. 940; *Smalley v. Laugenour*, 30 Wash. 307, 70 Pac. 786; *Noble v. Whitten*, 34 Wash. 507, 76 Pac. 95; *Woelflen v. Lewiston-Clarkston Co.*, 49 Wash. 405, 95 Pac. 493; *Wilson v. Puget Sound Elec. R. Co.*, 50 Wash. 596, 97 Pac. 727. The motion to dismiss must therefore be denied.

The provision of the statute thought to authorize the levy directed by the drainage commissioners is § 3738 of Ballinger's Code (P. C. § 4553), as the same was amended by the act of March 13, 1905. Laws 1905, p. 363. The section as amended reads as follows:

"Section 3738. The board of commissioners of any drainage district organized under the provisions of this act shall, on or before the first day of November of each year, make an estimate of the cost of maintenance of the drainage system constructed in such district, which estimate shall include the costs of making any necessary repairs that it might become necessary to make in the maintenance of such system. Such estimate shall be made for the succeeding year, and the amount so estimated shall be certified by the board of commissioners to the auditor of the county in which such district is located on or before said date, and the amount thereof shall be levied against and apportioned to the lands in such district benefited by said improvement, in proportion to, and upon the basis of the value of such lands as fixed by the last preceding equalized assessment roll of said county, and said amount shall be added to the general taxes against said lands, and collected therewith."

It seems plain to us that this section of the statute does not authorize the levy the drainage commissioners directed to be made in this instance. Manifestly it was intended to enable the drainage district to procure means for maintaining and repairing the drainage system after it had been completed. It contemplates that, before any levy shall be made for that purpose, an estimate shall be made by the drainage commissioners of the necessary cost of such maintenance and

repairs for the ensuing year and a levy made for that amount and no more. It contemplates also that the levy so made when collected shall be expended for the purposes for which it is levied and for no other purpose. No attempt was made to comply with these requirements of the statute in the instance in hand. No estimate at all was made by the commissioners. A part of the levy was expressly stated to be intended for another purpose than that permitted by the statute; and in so far as the levy might be said to be for the purposes authorized by the statute, it is in excess of any amount required for such purposes. This latter fact would avoid the levy even were we inclined to hold that the provision of the statute requiring the drainage commissioners to make an estimate prior to making a levy was merely directory, since there is no way of separating the excessive part from that which might otherwise be legitimate.

But the powers of the drainage commissioners are statutory, and before they can exercise so important a power as the power of taxation, they must be able to point to some provision of the statute expressly authorizing it, and must show, after they have exercised such power, that they have pursued the procedure provided by the statute with reasonable strictness. We think the commissioners failed in these respects in this instance, and that the attempted levy was void. This conclusion renders it unnecessary to discuss the constitutionality of the amendatory statute above quoted, and we leave that question undetermined.

The judgment appealed from will be reversed, and the cause remanded with instruction to adjudge the attempted levy void, and to restrain the officer whose duty it is to collect such taxes from attempting to enforce their collection.

ALL CONCUR.

Apr. 1909]

Syllabus.

[No. 7748. Decided April 1, 1909.]

FRED RANGENIER, *Respondent*, v. SEATTLE ELECTRIC
COMPANY, *Appellant*.¹

CARRIERS—PASSENGERS—SETTING DOWN INTOXICATED PASSENGER. Where the jury, upon conflicting evidence, must have found that a street car was suddenly started while the plaintiff was in the act of alighting, the company would be liable for negligence causing injuries whether the plaintiff was drunk or sober.

EVIDENCE—ADMISSIBILITY—RESPONSIVENESS. Where a witness is asked if he noticed plaintiff's condition as to sobriety, an answer that he thought he was drunk may properly be stricken as not responsive.

APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE—FACTS OTHERWISE ESTABLISHED. It is not prejudicial error to strike the statement of a witness that he thought the plaintiff was drunk, where afterwards he was asked what indications made him know plaintiff's condition, and he answered that he smelled as if he was drinking whiskey.

SAME—FAILURE TO ASK PROPER QUESTION. Defendant cannot complain of the striking of an answer of a witness that he thought plaintiff was drunk, where he did not pursue the inquiry, or ask whether plaintiff was intoxicated.

TRIAL—MISCONDUCT OF COUNSEL—ARGUMENT TO JURY—HARMLESS ERROR. It is not ground for reversal that counsel, in argument to the jury, stated that he had been a superior judge, and would not believe a certain witness under oath, where the court upon request at once instructed the jury that the witness had not been impeached and to disregard the statement, and the testimony of the witness related only to an incidental fact, and not to the pivotal question in issue.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. It is not error to refuse to give an instruction in the form requested, if given in language of the court's own choosing.

CARRIERS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS AS TO PROXIMATE CAUSE. Upon an issue as to the contributory negligence of a passenger in alighting from a street car, an instruction allowing recovery if the plaintiff was not guilty of negligence "which was the proximate cause of the accident," is not erroneous in failing to qualify "proximate cause," when considered in connection with an-

¹Reported in 100 Pac. 842.

other instruction to the same effect referring to "any negligence on his part which proximately or naturally contributed to his injury, and without which such injury would not have happened."

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$9,500 for the loss of a foot by a man sixty-four years of age, engaged in the real estate business and earning \$150 to \$200 per month, is excessive, and should be reduced to \$6,000.

Appeal from a judgment of the superior court for King county, Tallman, J., entered July 21, 1908, upon the verdict of a jury rendered in favor of the plaintiff, for \$9,500, for personal injuries sustained by a passenger in alighting from a street car. Reversed, and a new trial ordered unless \$3,500 is remitted.

James B. Howe, H. S. Elliott, and R. G. Sharpe, for appellant.

Albert D. Martin and Walter A. Keene, for respondent.

Gose, J.—This action, instituted to recover damages for personal injuries, resulted in a verdict and judgment in favor of the plaintiff for \$9,500. The defendant has appealed.

The complaint charges, that the plaintiff was a passenger on one of the defendant's street cars, in the city of Seattle; that he notified the gripman in charge of the car that he desired to get off the car at Eleventh street; that the car stopped at such street; that while the plaintiff was stepping off the car, and before he had time to do so, and while he had one foot on the ground and the other on the car step, with his hand holding to the iron bar upon the car provided for that purpose, the gripman, without any notice or warning to the plaintiff, started the car with a sudden jerk and at a great rate of speed, thereby violently throwing the plaintiff to the ground in such position that his right foot was thrown in front of the car wheels; that the car passed over his foot, and so bruised and mangled it that the plaintiff was compelled to, and did, have it amputated. The defendant joined issue upon the charge of negligence, and affirmatively pleaded the contributory negligence of the plaintiff. The reply put in

Apr. 1909]

Opinion Per Goss, J.

issue the charge of contributory negligence. The appellant assigns five errors, which we will consider *seriatim*.

(1) One of appellant's witnesses, after testifying that he was upon the car on which the plaintiff was riding, was asked the following question: "Did you notice his [respondent's] condition as to being under the influence of liquor or not?" Answer. "Well, I think that he was." Whereupon, on the motion of the respondent, this answer was stricken. Thereupon the appellant inquired of the witness as follows:

"Question. Did you see anything—any indication there about the man which made you know that he was under the influence of liquor? Did you notice anything? Mr. Bell: Objected to on the ground that the question is suggestive. The Court: He may answer. Answer: Why, he smelled as if he was drinking whiskey."

The ruling of the court in striking the answer to the first question is assigned as error. The pivotal question in the case, and the one which presumably was controlling with the jury, was whether the car had stopped when respondent started to alight, and if so, was it suddenly started while he was alighting. The sharp conflict in the testimony was on this question. The respondent's witnesses asserted that the car had stopped, and the appellant's witnesses were equally positive that it was going at the ordinary rate of speed. If the car was in motion at such time, the respondent, whether free from liquor or under its influence, could not recover under the instructions of the court. If we credit the jury with giving any heed to the court's instructions, we cannot escape the conclusion that they believed that the car had stopped when the respondent undertook to step off, and that, while he was in the act of stepping off, the appellant put the car into sudden and rapid motion without any warning or notice to the respondent. This being true, whether the respondent was drunk or sober would be no bar to his recovery. His condition as to sobriety would be only a circumstance touching his knowledge as to whether the car had stopped before he attempted to step off.

A reading of the question the answer to which was stricken will disclose that it was less comprehensive than the second question to which the court directed an answer. The court might properly have stricken the answer because it was not responsive to the question. The appellant, having been permitted to continue the inquiry into the conduct of the respondent which led the witness to form his opinion as to his being drunk, cannot complain because the witness rested his opinion on the one fact that he "smelled as if he was drinking whiskey." The questions called for all the indications which "made you know" that the respondent was under the influence of liquor.

Nor can the appellant complain because he did not interrogate the witness as to whether there were other actions or evidences from which he formed his opinion. Nor can it complain in that it failed to ask the witness the question, Was the respondent drunk or sober at the time of the accident, or was he under the influence of liquor at such time? The authorities cited by the appellant announce the correct rule as to the admissibility of this class of evidence, but we do not regard them as applicable to the facts in the case at bar. The court permitted the appellant to inquire of five witnesses whether the respondent was intoxicated at the time of the injury. Indeed, the entire course of the trial subsequent to the striking of the answer complained of, gave the appellant wide latitude in proving the respondent's condition. Had it pursued the inquiry with the witness, and had the court then denied it, the right to ask the question, Was the respondent drunk or sober, or was he or was he not intoxicated at the time of the injury, a different question would be presented.

(2) During the course of the argument to the jury, one of the respondent's counsel said:

"Gentlemen of the jury. I once occupied the position upon the bench now occupied by His Honor. I have known

Apr. 1909]

Opinion Per Gose, J.

Dr. Willis for fifteen years. He has come before me as a witness. I would not believe him under oath."

Whereupon one of the appellant's counsel, addressing the court, said:

"If it please your honor, I object to the argument of counsel for the plaintiff. Dr. Willis has not been impeached by any one. Counsel for the plaintiff has no right to state to the jury that he would not believe Dr. Willis under oath. I request the court to instruct the jury to disregard the statement."

Whereupon the court said to the jury:

"Gentlemen of the jury. Dr. Willis has not been impeached by any witness, and you are instructed to disregard the statements of counsel in reference to Dr. Willis not being believed under oath."

This remark of counsel is assigned as error. The cases from this court excluding suggestions in personal injury suits, to the effect that the defendant carries indemnity insurance, we do not regard as applicable. Nor do we think this case is controlled by *Spencer v. Arlington*, 49 Wash. 121, 94 Pac. 904. In that case the court, in the absence of the jury, had commented on the weight of the evidence. Counsel said, in arguing the case to the jury:

"It has been said here by one who knows more about these things than I, that no one in the exercise of common sense could look at the conditions there and say that it was not a highway."

This was held error in that its necessary effect was to impress on the mind of the jury the belief that the statement had been made by the court. A jury, justly regarding the court as an impartial trier, is quick to adopt or be influenced by any suggestions it may make. But the fact that the learned counsel had been at one time a superior judge would not give to his remarks the weight which the jury attaches to the remarks of the trial judge. When the reason for the influence ceases, the influence itself ceases. We must credit

the jury with the possession of ordinary common sense, and such presumption leads to the conclusion that a jury understands that, when a lawyer retires from the bench and engages in the trial of a case, he ceases to occupy the position of an impartial arbiter, and becomes a partisan. What he may then say to a jury in the heat of an argument has no greater weight than like observations from other equally reputable counsel. It is the duty of the trial lawyer to be zealous in the advocacy of his client's cause. The common opinion of all mankind has fixed this as the measure of his professional responsibility. In the discharge of this duty a reasonable latitude must be allowed him. It is true that there is a border line beyond which he cannot transgress. It is often difficult to define and establish this boundary, and it is therefore only in clear cases of abuse of this privilege that the courts will reverse a case on account of misconduct of counsel. Counsel are but the representatives of the parties to the action. The lawyer speaks for his client, and the jury, in recognition of this fact, presumably treats his argument from this viewpoint. Indeed, experience and observation teach that fairness of counsel in the presentation of a cause is usually more persuasive with the jury than is an effort to secure a verdict by means of intemperate speech.

This court has always been slow to reverse a case because of the intemperate speech of counsel. In *Abby v. Wood*, 43 Wash. 379, 86 Pac. 558, the court, in considering the question of remarks of counsel, at page 382, said:

"Exception is also taken to certain remarks made by the respondent's attorney in the presence of the jury. While perhaps not entirely proper, yet, we do not believe that these remarks were susceptible of any injury to appellant's cause, or that they were made from any improper spirit."

In *Thomson v. Issaquah Shingle Co.*, 43 Wash. 253, 86 Pac. 588, an affidavit of an absent witness had been admitted and read in evidence. This had been done by agreement of

Apr. 1909]

Opinion Per GOSE, J.

counsel to avoid a continuance of the case. Counsel commented on this affidavit. At page 258 the court say:

"Counsel for respondent did, perhaps, to some extent, transgress the rules of propriety, but we cannot say that his acts were prejudicial, especially in the light of the court's explanation and instructions immediately given to the jury."

In *Yakima Valley Bank v. McAllister*, 37 Wash. 566, 79 Pac. 1119, 107 Am. St. 823, 1 L. R. A. (N. S.) 1075, the court at page 576, say:

"Nor do we think that the somewhat heated expressions of counsel in the argument of the case would justify a reversal of the judgment."

"The remedy to correct misconduct of counsel is to move the trial court to act in the matter, and except to its refusal so to do, if it does so refuse; it is not enough merely to except to the supposed misconduct." *State v. Van Waters*, 36 Wash. 358, 78 Pac. 897.

In *State v. Boyce*, 24 Wash. 514, 64 Pac. 719, at page 528, the court, speaking through Mr. Justice Dunbar, say:

"Some latitude must be given to counsel in the heat of discussion, and, as has been often said, if every apparent indiscretion which a counsel is guilty of in his remarks to the jury were to be the subject of review, the appellate court would have no time to pass upon graver questions, but its time would be occupied in reviewing remarks of counsel."

See, also, *Taylor v. Ballard*, 24 Wash. 191, 64 Pac. 143. Indulging the presumption that the jury applies common sense to the consideration of a case, we are not willing to reverse on account of the extravagant statement made by counsel. However, we do not want to be understood as endorsing remarks of this character. We have heretofore said that the crucial question in the case was, whether the car had stopped when the respondent started to step off, and whether the car was at such time suddenly put in motion. The witness to whose testimony this remark was addressed had not testified as to this fact. His testimony was that some time after the accident, when the witness saw the respondent

at the hospital, the latter was intoxicated. This was only one of the incidental facts which arose during the progress of the trial. This being true, we cannot free our minds from the conviction that the prompt action of the court in instructing the jury that the witness had not been impeached, and that they should disregard the statement of counsel, satisfied the requirements of the law. The appellant urges that the injury resulting from the statement was aggravated by the fact that the counsel had formerly been a judge. If weight is attached to the unsworn statement of an ex-judge who is counsel in a cause, delivered in the heat of argument, it is reasonable to assume that the jury heeded the admonition of the trial judge to disregard such statement.

"That the practice complained of is highly reprehensible, no one can doubt. It ought in every instance to be promptly repressed." *Hayes v. Smith*, 62 Ohio St. 161, 188, 56 N. E. 879.

This expression has our heartiest indorsement. It is no part of the duty of the advocate to obtrude his personal opinion upon the jury, either as to the veracity of a witness or the weight of the evidence. Had not the trial court promptly directed the jury as it did, or had counsel persisted in making intemperate remarks outside the record, we would feel it our duty to reverse the case on account of the misconduct of counsel.

(3) The appellant assigns error in the refusal of the court to instruct the jury as follows:

"You are instructed that if you find from the evidence that the said Fred J. Rangenier stepped or attempted to step from the car while it was in motion, then said Rangenier in so doing assumed all the risks of such attempt and was guilty of contributory negligence barring his recovery and your verdict must be for the plaintiff."

The court instructed thereon as follows:

"You are further instructed that, even though you find that the defendant company failed to stop at the point where

Apr. 1909]

Opinion Per Goss, J.

plaintiff indicated his desire to alight, still it would constitute such negligence on the part of the plaintiff in attempting to alight from a moving car after having passed such desired point as to bar his recovery in the event of injury resulting therefrom. Under such circumstances if the car failed to stop as requested by plaintiff, it was his duty to remain on the car until the car stopped, and if necessary look to the company for any damages he may have suffered by reason of being carried beyond his destination."

The two instructions are identical in meaning, and the one given certainly goes to the limit in favor of the appellant. We have uniformly held that the court need not adopt the exact language of a requested instruction, but that it may, without committing error, express the same meaning in words of its own choosing. *State v. Anderson*, 30 Wash. 14, 70 Pac. 104; *Smith v. Michigan Lum. Co.*, 43 Wash. 402, 86 Pac. 652.

(4) Error is assigned to the giving of the following instruction:

"You are instructed that whether or not a passenger has been guilty of negligence in alighting from a street car is a question of fact for the jury to determine, and if in this case you find from a fair preponderance of the evidence that the injury sustained by the plaintiff was due to carelessness or negligence on the part of the gripman in starting the car upon which plaintiff was a passenger before he had sufficient time to alight then your verdict must be in favor of plaintiff and against the defendant in such sum as will fully compensate plaintiff for all injuries sustained by him, provided you further find that the plaintiff was not guilty of negligence which was the proximate cause of the accident."

It is urged that the words "proximate cause" should have been qualified in this instruction. In other words, that the instruction placed too great a burden upon the appellant. The court had theretofore instructed as follows:

"You are further instructed that, even if you find that the defendant company was guilty of the negligent acts complained of in plaintiff's complaint, and that such negligence

was the cause of the alleged or any injury to the plaintiff, nevertheless if you find that the plaintiff was guilty of any negligence on his part which proximately or naturally contributed to his injury, and without which such injury would not have happened, then plaintiff cannot be permitted to recover in this action and your verdict must be for the defendant."

Both of these instructions have support in the decided cases. While we concede that the latter instruction is the more exact statement of the law of proximate cause, yet we do not conceive that they are so at variance as to require a reversal of the case. We are not willing to assume that the jury analyzed the words with such a degree of nicety as to have been misled by the instruction to which the objection is made, when the same is taken in connection with the one which we have just quoted. The instructions taken as a whole correctly informed the jury as to the governing rule. This is all the law requires. *White v. Territory*, 1 Wash. 379, 19 Pac. 37; *Sullivan v. Wood & Co.*, 43 Wash. 259, 86 Pac. 629, 117 Am. St. 1047; *Carstens & Earles v. Parker*, 26 Wash. 702, 67 Pac. 1134.

(5) In this assignment it is urged that the verdict, which was for \$9,500, was excessive. Under this head the appellant says: "The ultimate result of the accident was the amputation of one of plaintiff's legs three or four inches above the ankle." The evidence shows that the respondent was sixty-four years of age, in good health at the time of the injury, and that he was engaged in the real estate business and earning from \$150 to \$200 per month.

"It is a fact, lamentable as it may be, that the earning capacity of men decreases after middle life, and usually decreases very rapidly While this court dislikes to interfere with the prerogative of the jury in passing upon questions of fact, when a verdict rendered shows conclusively that the judgment could not have been based upon the testimony produced, it becomes its duty to interfere." *Vowell v. Issaquah Coal Co.*, 31 Wash. 103, 71 Pac. 725.

Apr. 1909]

Statement of Case.

We think, therefore, in view of the respondent's age, that the verdict was excessive to the extent of \$3,500.

The judgment of the court below is therefore reversed; and if the respondent elects to accept \$6,000 and costs in the court below, within ten days after the remittitur is filed, then a new judgment will be entered for that amount; otherwise a new trial is granted. The appellant will recover its costs in this court.

ALL CONCUR, except PARKER and MORRIS, JJ., who took no part.

[No. 7843. Decided April 1, 1909.]

M. FRANCIS KANE, *Appellant*, v. THOMAS DAWSON *et al.*,
Respondents.¹

APPEAL—REVIEW—NONSUIT—CORRECT DECISION BASED ON WRONG GROUND. Upon appeal from a judgment of nonsuit, where the evidence is before the supreme court, the judgment will be affirmed if correct, considering all the evidence, although the trial judge based his ruling on an incorrect view of the law.

BROKERS—ACTION FOR COMMISSION—AUTHORITY. Where a broker was authorized to procure a purchaser who would assume assessments levied on the property he is entitled to commissions upon making a sale by the terms of which the purchaser was to deduct the assessment from the purchase price, which was not satisfactory to the owner.

SAME—TIME FOR CONTRACT. An action for a broker's commission is properly nonsuited where it appears from the date of checks given as earnest money that the sale was not made within the life of the broker's authority.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered October 17, 1908, upon granting a nonsuit, after a trial before the court without a jury, dismissing an action on contract. Affirmed.

John T. Mulligan and James C. Moody, for appellant.

Willett & Willett, for respondents.

¹Reported in 100 Pac. 837.

CHADWICK, J.—Plaintiff brought this action to recover a real estate commission on a contract whereby defendants made him their agent to find a purchaser for certain property owned by them. The contract was entered into on November 5, 1906, and expired November 25 following. After that day the time limit was extended until December 5. The contract is set out in full in the case of *Littlefield v. Dawson*, 47 Wash. 644, 92 Pac. 428. This case was tried by the court without a jury. At the conclusion of plaintiff's case, the court sustained a motion for nonsuit, and plaintiff has appealed.

In passing upon the motion for nonsuit the court, among other things, said:

"I am satisfied from the evidence so far produced in this trial that Mr. Littlefield was ready, able and willing to buy this land upon the terms specified in the contract between the plaintiff and the defendants; that the failure to carry out that arrangement was by reason of the defendants in this case changing their mind as to their desiring to sell the property at the figures quoted in the contract. The case, however, must be decided upon the legal questions involved. I think under that contract that it was incumbent upon the plaintiff in this case either to find a purchaser ready, willing and able to purchase and produce him to the defendants, or enter into a binding contract with the purchaser so that he would be bound by the terms of his contract."

An elaborate discussion of the authorities is submitted for the purpose of showing the error of the court in this behalf. It may be that the court was in error in holding that appellant could not recover on his contract unless he had brought the parties face to face, or a contract had been entered into that could have been enforced against the vendee, if it had also been shown that the vendors had repudiated their contract. The question is not a new one, and has been decided by this court. *Foster v. Taylor*, 44 Wash. 313, 87 Pac. 358.

But we do not feel that we are bound by the reasoning of the lower court in passing upon a motion of this character.

Apr. 1909]

Opinion Per CHADWICK, J.

The motion calls for a review of the evidence. The question before us is not whether the lower court arrived at a correct conclusion by an incorrect process of reasoning, but whether, considering all the evidence, its decision was the proper one to be entered. The court further found that the contract or receipt given by appellant to Mr. Littlefield, the purchaser, did not comply with the terms of the contract between appellant and respondents. This deduction from the evidence was well founded, and is in itself sufficient to sustain the judgment of the court. By the terms of his contract with respondents, appellant had undertaken to find a purchaser who would pay the purchase price and in addition thereto assume such assessments as might be then levied against the property; whereas the receipt for earnest money given Mr. Littlefield provided that the purchaser might assume the assessments and, if he did so, he could deduct them from the purchase price. Mr. Littlefield was not then a purchaser who was ready, able, and willing to buy upon the terms proposed by respondents.

There is another reason that warrants us in sustaining the lower court. The testimony of appellant and his witnesses does not convince us that the sale was made within the life of the contract. Two checks were drawn and given by Mr. Littlefield to appellant as earnest money; one for \$100 was drawn and delivered December 8; the other for \$400 on December 14. This, taken in connection with the testimony of Mr. Kane and Mr. Littlefield, shows that the sale was attempted to be made about the time the check for \$100 was drawn, or three days after the contract with respondents had expired.

The judgment of the lower court is affirmed.

ALL CONCUR, except PARKER and MORRIS, JJ., who took no part.

[No. 7942. Decided April 1, 1909.]

J. W. RAYBURN *et al.*, Appellants, v. ROBERT ABRAMS *et al.*, Respondents.¹

APPEAL—DECISIONS APPEALABLE—DEFAULT AFTER SUSTAINING DEMURRER—DISMISSAL. A judgment of dismissal, for default in amending a complaint, after sustaining a demurrer thereto, is appealable; since no exception was necessary to the order sustaining the demurrer and no further steps are necessary to secure a review, excepting an appeal (*Overruling Pacific Supply Co. v. Brand*, 7 Wash. 357, and *Hall v. Skavdale*, 21 Wash. 203).

Motion to dismiss an appeal from a judgment of the superior court for King county, Albertson, J., entered December 2, 1908, dismissing an action upon failure of the plaintiff to amend, after sustaining a demurrer to the complaint. Denied.

Will H. Thompson and *J. W. Rayburn*, for appellants.
Hughes, McMicken, Dovell & Ramsey, for respondents.

DUNBAR, J.—A demurrer was sustained to the plaintiffs' amended complaint. There was no request to further amend, and after the time had expired for the amendment of the complaint, a motion was made for judgment dismissing the action. The motion stated that the plaintiffs had wholly failed to plead further, or to make any application for leave to file a further amended complaint, and that the time of said plaintiffs so to do had expired. The motion was sustained by the court, and judgment of dismissal was entered. Appeal was duly taken from this judgment, and motion is made here to dismiss the appeal, for the reason that it is not an order or judgment from which an appeal will lie, the contention being that the judgment was a judgment by default.

The respondents rely on the case of *Pacific Supply Co. v. Brand*, 7 Wash. 357, 35 Pac. 72, and *Hall v. Skavdale*, 21 Wash. 203, 57 Pac. 807. In the case of *Pacific Supply*

¹Reported in 100 Pac. 751.

Apr. 1909]

Opinion Per DUNBAR, J.

Co. v. Brand, after the sustaining of the demurrer, the appellant asked, and was granted, ten days to amend his complaint. After the lapse of that time, no proceedings having been had, the respondents moved the court for an order adjudging appellant to be in default, and for a dismissal of the action, whereupon the court entered an order accordingly and dismissed the action; and it was held that an appeal would not lie from a judgment of dismissal for want of prosecution. The case of *Hall v. Skavdale* was the same kind of a case, and simply followed the former case. The fact that the appellants in the cases above cited asked leave to amend their complaints might be some indication that they had abandoned the original complaints, and that, upon the failure to file the amended complaint within the time prescribed, they had abandoned the whole cause of action. Still they were under no obligation to ask leave to file an amended complaint, and the cases can scarcely be distinguished in principle from the case at bar. But after a reconsideration of this question, we are inclined to the view that the earlier cases were wrongly decided, and that the appellants were deprived of their right of appeal without just cause.

The pertinent question is, what is the particular thing that the appellants should do to preserve their right to appeal? What does the law require them to do? If there is no duty violated, it is fundamental that no penalty should attach, and that there should be no deprivation of rights. There seems to be no duty prescribed excepting the notice of appeal, which in this case was given within the time allowed by the law. Presumably there was no amendment which the appellants could make. They had probably stated all the case they had. The demurrer challenged the sufficiency of those statements. The court decided that they were not sufficient to constitute a cause of action, and on that question alone they desired to appeal. On that question they had a right to the judgment of the appellate court. What should they do? They had a right to submit their case to the court

without argument and without being present. Probably professional courtesy might require their presence in the court, or even the presentation of their views on the subject under discussion; but these are matters outside of legal rights or directions. But if they had been in court and had announced that they desired to stand on their complaint, that would have been nothing more in substance than an exception to the ruling of the court on the demurrer, and under the decisions of this court and the plain provisions of the statute, they are not compelled to except; because the exception is apparent upon the record. The case of *Long v. Billings*, 7 Wash. 267, 34 Pac. 936, seems to sustain this view. There, in discussing the motion to dismiss, it was said:

"In this case there was no necessity for a bill of exceptions to be settled and signed. The only error assigned was upon the judgment of dismissal. The decision of the superior court was substantially the sustaining of a demurrer to the complaint, which was made apparent upon the record, and no exception was necessary."

Here the only question sought to be raised is the decision of the court sustaining the demurrer to the complaint, and no exceptions being necessary, and the statute not prescribing any other action or duty on the part of the appellants, excepting an appeal, this court is without authority to dismiss appellants' appeal.

The motion will therefore be denied.

ALL CONCUR.

Apr. 1909]

Opinion Per DUNBAR, J.

[No. 7682. Decided April 2, 1909.]

DAVID GROSS, *Respondent*, v. W. J. BENNINGTON,
Appellant.¹

JUDGMENT—UPON ADMISSIONS—OPENING STATEMENT OF COUNSEL. A judgment against the defendant upon the admissions of counsel in his opening statement to the jury, with issues made by the pleadings to be tried out, can only be sustained where the admissions are deliberately made and distinct, and absolutely preclude a recovery.

BILLS AND NOTES—DEFENSES—FAILURE OF CONSIDERATION—BONA FIDE HOLDERS—NOTICE TO INDORSEE. Where a bank, the indorsee of a note, gave a recommendation to the agent of a railroad to use in securing the note from the makers in consideration of proposed railroad construction, knowing that the railroad was bankrupt, the bank acquires the note with notice of its infirmity by reason of failure of the consideration for which the note was given.

BILLS AND NOTES—ASSIGNMENTS. One deraigning title to a note by assignment from the indorsee, takes subject to any defense that might be made against the indorsee.

BILLS AND NOTES—DEFENSES—FAILURE OF CONSIDERATION. A contract to furnish transportation over a proposed railroad, and a note given in consideration of the contract must be construed together, and failure of the company to construct the road is a good defense to an action on the note.

Appeal from a judgment of the superior court for Adams county, Frater, J., entered January 24, 1908, in favor of the plaintiff, upon the pleadings and defendant's opening statement to the jury, after the close of plaintiff's case, in an action upon a promissory note. Reversed.

Henley & Kellam, for appellant.

Lovell & Davis, for respondent.

DUNBAR, J.—This was an action by the plaintiff, as an innocent holder of a promissory note payable to the order of the Spokane-Columbia River Railroad & Navigation Company. The complaint alleges the execution of the note and

¹Reported in 100 Pac. 846.

that the payee, the said railroad company, for a good and valuable consideration, duly indorsed and delivered the note to the German-American Bank, and that afterwards the note was duly assigned and delivered to M. B. Burkhart, who in turn assigned and delivered the same to the plaintiff.

The answer denied that the note was by the railroad company indorsed to the bank, and denied knowledge or information sufficient to form a belief that the note was assigned to Burkhart, or that it was by him assigned to the plaintiff. The answer then set up an affirmative defense to the effect, in short, that this note was given in consideration of the construction of a certain railroad and the promise to furnish the payor of the note with certain transportation; that the road was never built, and the transportation never furnished; that, at the time this note was placed in the hands of the bank, it had full knowledge that the railroad company would not carry out its contracts with the payor of the note, and that it did not intend to build, equip, and operate the road it had agreed, etc., but that the defendant was ignorant of this at the time he signed said note, and signed it upon the representations of the railroad company, and that if the notes were indorsed or assigned to Burkhart and by Burkhart to the plaintiff, the assignments and delivery in each instance were made with full notice and knowledge of all the facts set forth; that the bank held these notes as collateral security for a debt of the Spokane-Columbia River Railroad & Navigation Company, in the sum of \$5,000, and no more, and without authority so to do, sold or pretended to sell all of said notes, of the face value of not less than \$15,000, to the said Burkhart, who was then a trustee of the bank, who did not pay to exceed \$2,500 for the same; that one Bennington and one Hunt, being financially able so to do, and being also signers of said notes, with the intention of protecting this defendant and all other signers of said notes, went to the bank and offered to take up and pay to said bank the amount of said \$5,000 note and interest, and take

Apr. 1909]

Opinion Per DUNBAR, J.

over from that bank said note and the notes hereinbefore referred to, claimed by said bank to be held as collateral to said \$5,000 indebtedness, for the purpose and with the understanding that the said Bennington and Hunt should *pro rate* the amount so paid to the bank and collect from the signer of each note his proper proportion of the same, and upon such payment being made to cancel and deliver up each note to the signer thereof, which offer the said bank refused to accept, assigning as a reason therefor that the said bank proposed itself to protect the signers of said notes against the fraud of said railroad company. This is sufficient of the answer, probably, to set forth.

No reply was made to the affirmative matters set up in the answer. The plaintiff made his opening statement to the jury, and proceeded to the trial of his cause. Upon the conclusion of plaintiff's case, the defendant made an opening statement to the jury, and at the conclusion of said statement, motion was made for judgment upon the statement and upon the pleadings, which motion was granted.

An examination of the answer in this case certainly precludes the idea that judgment could have been granted on the pleadings; for many of the essential matters stated in the complaint are denied in the answer, to say nothing of the affirmative matters set forth as a defense. Nor does the appellant in his brief insist that the motion should have been granted upon the pleadings alone. It is, of course, well established that a court cannot properly render judgment until all the issues raised by the pleadings are determined. The issues not having been determined by the answer, but having been put squarely in issue, was there anything in the statement made to the jury by counsel for the appellant that would settle all the matters at issue under the pleadings? We think not. It seems to us the court's ruling was a harsh one under the circumstances. It is, no doubt, true that there are instances where, by a statement made by counsel, his defense may be entirely swept from under him. But these statements

must be deliberately made, and the admissions must be distinct, and such admissions as would absolutely preclude a recovery. But all the courts agree that the power of the court in this particular should be exercised with caution, and that counsel should have the benefit of the presumption that he did not intend to make a statement or admission that would be fatal to his case.

It is contended by the respondent that the appellant admitted that the note was transferred to the German-American State Bank; that the German-American State Bank gave for this note and several others the sum of \$5,000, and that the \$15,000 was placed to the credit of the railway company, the holder of this note. But even admitting this, it was denied that the notes were indorsed, and that was an issue in the case. It is true that respondent's witnesses testified that the notes had been indorsed, but that did not establish it beyond the reach of any testimony which the appellant might see fit to offer on the issue raised. He might have shown that the indorsement alleged to have been made by the railroad company was not its indorsement, that it was not genuine, and that the note was never indorsed or delivered to subsequent holders; and under the allegations of the answer it could have been shown that the assignment to Burkhart was fraudulent. It must be borne in mind that there was no reply to the affirmative allegations of this answer; nor was it demurred to, though that was the proper place in the proceedings to have raised the question that has been raised by the respondent here, so far as the pleadings are concerned. We are unable to find anything in the statement made by counsel for appellant that would militate against the right of the respondent to defend this action. He did not state that the makers of these notes had information in relation to the irresponsibility of this company, but that statement was made with reference to the bank.

"These matters," said the counsel, "were all brought to the attention of the bank. We will show you that the officers

Apr. 1909]

Opinion Per DUNBAR, J.

of the bank know or should have known—an ordinary inquiry would have led them to know—that the railroad company was at that time bankrupt; were not able to meet any obligation; were at that time absolutely in debt beyond the value of their assets; that ordinary inquiry would have developed the fact to these men that it would have taken from \$250,000 to \$500,000 to have put the railroad company in a position where the Elden-Belt contract could have taken effect, if it would have taken effect under any circumstances.”

Counsel places stress on the assertion that an ordinary inquiry would have led them to know; but an ordinary inquiry that might lead a bank, which was doing business with a large concern and looking after its financial interests with the care and caution with which such institutions are presumed to look after their interests, to determine certain facts, would not be held sufficient to place a farmer or persons engaged in business of that kind on their guard. But it is still further a matter of issue in this case that the bank gave the agent of the railroad company a recommendation with which he went to the farmers and used to obtain the signatures to these notes, knowing at the time this recommendation was given that the railroad company would not be able to carry out its contracts with the farmers. If this is true, then the bank had notice of the infirmity in the instrument which it purchased, and that such infirmity would constitute a defense in the hands of the payee. Burkhart and Gross, deraigning their title to the note, not by indorsement but by assignment, stand in the same position that the bank stood. Again, the contract to furnish transportation and the note contract must all be construed together, and construing them together, the failure of the one would be a defense to the other. We think, under the pleadings and all the facts stated, that the court erred in granting the motion for judgment. The judgment is therefore reversed.

RUDKIN, C. J., MOUNT, CROW, and FULLERTON, JJ.,
concur.

GOSE, CHADWICK, PARKER, and MORRIS, JJ., took no part.

[No. 7826. Decided April 3, 1909.]

GEORGE C. LONG, *Respondent*, v. McCABE & HAMILTON,
INCORPORATED, *Appellant*.¹

MASTER AND SERVANT—FELLOW SERVANTS—DUTY OF MASTER—PRESUMPTION—OCCURRENCE OF NEGLIGENT ACT—BURDEN OF PROOF. While it is the duty of the master to make a reasonable effort to ascertain the competency of a servant, negligence in that respect is not presumed from the occurrence of an accident through such servant's neglect, but the burden is on plaintiff to prove (1) the fellow servant's incompetence; and (2) that the master knew or should have known thereof.

TRIAL—PROVINCE OF COURT AND JURY—NONSUIT. While courts may not determine the weight of the evidence, if there is no evidence of a fact essential to sustain liability, they must so declare the fact.

MASTER AND SERVANT—FELLOW SERVANTS—MASTER'S KNOWLEDGE OF INCOMPETENCY—PRESUMPTION—EVIDENCE—SUFFICIENCY—OPINIONS. The opinion of a single witness that a fellow servant was timid and therefore incompetent to drive a winch, without proof of a single prior negligent act, is not sufficient to charge the master with notice of his incompetency, or overcome the presumption that the master had performed his duty in employing competent fellow servants.

SAME—NEGLIGENCE OF MASTER IN EMPLOYING SERVANT—EVIDENCE—SUFFICIENCY—NEGLIGENT ACTS. The rule that evidence of negligent acts of a fellow servant from which incompetency might be inferred makes a *prima facie* case that the master was negligent in employing him, is not to be extended to a case where his only negligent act was the act complained of.

TRIAL—PROVINCE OF COURT AND JURY—PRIMA FACIE CASE—SHIFTING BURDEN OF PROOF—QUESTIONS OF LAW. Where the burden of proof is shifted from the plaintiff to the defendant by a *prima facie* case sufficient to overcome a presumption in favor of the defendant, and is then shifted back to the plaintiff by defendant's counter evidence, plaintiff's *prima facie* case must, on demurrer to the evidence, be measured by defendant's evidence, and determined as a matter of law in the light of defendant's explanations.

MASTER AND SERVANT—FELLOW SERVANTS—NEGLIGENCE OF MASTER—SHIFTING BURDEN OF PROOF—EXPLANATIONS OF DEFENDANT—EVIDENCE—SUFFICIENCY. Negative evidence of the incompetence of a fellow servant to run a winch, consisting of the opinion of a single witness that he was incompetent, the fact that witnesses had never

¹Reported in 100 Pac. 1016.

Apr. 1909]

Citations of Counsel.

seen him run a winch, the fact that he asked instructions how to run it, and the fact of the negligent act complained of, if sufficient to cast the burden of proof upon the master to show the exercise of due care in employing him, is destroyed and overcome, as a matter of law, by defendant's positive evidence that the servant had driven winches off and on for twenty years, that he had driven winches on specified vessels, and for several hours on one vessel with the plaintiff, and that he had a good reputation and was qualified as a winch driver, and that the act complained of was done according to a fixed custom to carry an empty sling out over the deck without stopping for a second signal; and the burden having again shifted and so still being upon the plaintiff to establish his case, a nonsuit is properly granted; since negative evidence must give way to positive evidence, and what amounts to a *prima facie* case may not be so when rebutted.

FULLERTON, J., dissents.

Appeal from a judgment of the superior court for King county, Tallman, J., entered June 9, 1908, upon the verdict of a jury rendered in favor of the plaintiff, for personal injuries sustained by a stevedore in loading a ship. Reversed.

R. S. Eskridge and Hughes, McMicken, Dovell & Ramsey, for appellant, contended, among other things, that proof that a fellow servant was negligent in one instance does not tend to prove his incompetency. *Tucker v. Missouri etc. Tel. Co.* (Mo.), 112 S. W. 6; *Baltimore Elevator Co. v. Neal*, 65 Md. 438, 5 Atl. 338; *Buckley v. Gould etc. Min. Co.*, 14 Fed. 833; *Sullivan v. New York etc. R. Co.*, 62 Conn. 209, 25 Atl. 711; *Baulec v. New York etc. Co.*, 62 Barb. 623; *Id.* 59 N. Y. 356; *Rush v. Murphy Co.*, 135 Iowa 376, 112 N. W. 814; *Wicklund v. Saylor Coal Co.*, 119 Iowa 335, 93 N. W. 305; 26 Cyc. p. 1297, note 91; *Cooper v. Milwaukee etc. R. Co.*, 23 Wis. 668; *Hathaway v. Illinois Cent. R. Co.*, 92 Iowa 337, 60 N. W. 651. Negligence cannot be imputed from the employment of an otherwise competent servant merely because he lacks experience; nor is inexperience conclusive of incompetency. *Gorman v. Minneapolis etc. R. Co.*, 78 Iowa 509, 43 N. W. 303; *National Fertilizer Co. v. Travis*, 102 Tenn. 16, 49 S. W. 832; *Kellogg v. Stephens*

Lumber Co., 125 Mich. 222, 84 N. W. 136; *Ohio etc. R. Co. v. Dunn*, 138 Ind. 18, 36 N. E. 702, 37 N. E. 546; *Haskin v. New York Cent. etc. R. Co.*, 65 Barb. 129. The burden was on the respondent to overcome the presumption that Tommie Moore was competent. *M'Charles v. Horn Silver Min. etc. Co.*, 10 Utah 470, 37 Pac. 733; *Roblin v. Kansas City etc. R. Co.*, 119 Mo. 476, 24 S. W. 1011; *Davis v. Detroit etc. R. Co.*, 20 Mich. 105, 4 Am. Rep. 364; *Wright v. New York Cent. R. Co.*, 25 N. Y. 562; *Wood, Master and Servant* (2d ed.), § 419.

Blaine, Tucker & Hyland and *Robert C. Saunders*, for respondent, contended that the master was guilty of negligence in employing a servant known to him to be incompetent. *Seewald v. Harding Lumber Co.*, 49 Wash. 655, 96 Pac. 221; *Conover v. Neher-Ross Co.*, 38 Wash. 172, 80 Pac. 281, 107 Am. St. 841; *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310; *Smith v. Michigan Lumber Co.*, 43 Wash. 402, 86 Pac. 652; *Melse v. Alaska Commercial Co.*, 42 Wash. 356, 84 Pac. 1127. The questions of incompetency of the servant and contributory negligence of the plaintiff were for the jury and should not, upon a disputed state of facts, be disturbed by this court. *Bunnell v. St. Paul etc. R. Co.*, 29 Minn. 305, 13 N. W. 129; *Crandall v. McIlrath*, 24 Minn. 127; *Lee v. Michigan Cent. R. Co.*, 87 Mich. 574, 49 N. W. 909; *Western Stone Co. v. Whalen*, 151 Ill. 472, 38 N. E. 241, 42 Am. St. 244; *Evansville etc. R. Co. v. Guyton*, 115 Ind. 450, 17 N. E. 101, 7 Am. St. 458; *Keith v. New Haven etc. R. Co.*, 140 Mass. 175, 3 N. E. 28; *New York etc. S. S. Co. v. Anderson*, 50 Fed. 462.

CHADWICK, J.—Plaintiff brought this action against defendant to recover damages sustained by reason of a fall from the deck of the steamship *Nebraskan*, which was at the time of the accident engaged in loading railroad draw-bars at a dock in the city of Seattle. Defendant is an incorporated company, engaged in stevedoring, and employs

Apr. 1909]

Opinion Per CHADWICK, J.

through its foreman crews or gangs of men to load and unload ships. At the time plaintiff was injured, one Tommie Moore was engaged by defendant as yardarm winchman, one Harris as midship winchman, and plaintiff as hatch tender.

The method of loading was as follows: A bullion sling, made of heavy rope closely woven and weighing about one hundred and twenty-five pounds, was laid on the dock. In this was placed about a ton weight of the irons. The load was then hoisted by the yardarm winchman, and brought clear of the ship and over the hatch, when he reversed his winch, letting out his fall line, the load being taken by the midship winchman and lowered into the hold. When dumped, the empty sling was raised by the midship winchman, carried clear of the hatch coamings, where the load of the sling was shifted to the yardarm winch and was carried by the yardarm winchman across the deck, the midship winchman in turn reversing his winch so as to let out the slack of his fall line. The load was lifted and carried from the deck clear of the ship and over the hatch upon a signal from the hatch tender, and lowered by the midship winchman upon a like signal. In taking out the empty sling, the midship winchman acted upon signal, but whether it was to be taken on out by the yardarm winchman as soon as it was clear of the hatch coamings, or to be held awaiting a signal before it was carried across the deck, was the principal ground of dispute in the court below.

It was the duty of the hatch tender to see that all was clear in the hold of the ship as well as upon the dock. This made it necessary for him to follow the load and watch it until it was dumped in the hold of the ship, and in turn, after seeing that all was clear below, walk from the hatch to the side of the vessel to see that the loaders were ready for the empty sling, and that no one was in the way when he signaled the yardarm winchman to drop it.

After three loads had been carried in, plaintiff ordered

the sling brought out of the hold, and then turned and walked toward the side of the ship. He says he had taken two or three steps. Tommie Moore, upon whose alleged negligence plaintiff's right of recovery is predicated, says he was standing at the side of the vessel with one foot on the foot rail looking down on the dock when he was struck by the sling, carried over the side of the ship, and received the injuries of which he now complains. Defendant moved for judgment at the close of plaintiff's case, for judgment at the close of the testimony, for judgment notwithstanding the verdict, and for a new trial, all of which motions were denied. From a judgment in favor of plaintiff, defendant has appealed, and has assigned the several rulings of the court, as well as the entry of judgment, as error for review by this court.

It will be seen that respondent seeks to hold appellant liable for a breach of its duty to employ a competent fellow servant. This court has laid down the rule that it is the duty of the master to make a reasonable effort to ascertain the qualifications of a servant employed to work with others. *Pearson v. Alaska Pacific Steamship Co.*, 51 Wash. 560, 99 Pac. 753; *Seewald v. Harding Lumber Co.*, 49 Wash. 655, 96 Pac. 221; *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310; *Melse v. Alaska Commercial Co.*, 42 Wash. 356, 84 Pac. 1127; *Smith v. Michigan Lumber Co.*, 43 Wash. 402, 86 Pac. 652.

Negligence of the master in the performance of this duty will not be presumed from the mere occurrence of an accident, the result of a negligent act. It is a fact to be proved by plaintiff. He must show by a preponderance of the evidence two things: that the servant was incompetent, and that the master knew, or should have known, of his incompetency in the light of all the evidence. 26 Cyc. 1296-1299.

Courts should not undertake to determine the weight of evidence; but if in the discharge of their duty it appears that there is no evidence within the rules aforementioned, they should meet the responsibility put upon them and so

Apr. 1909]

Opinion Per CHADWICK, J.

declare the fact. In the instant case, the testimony relied upon to prove the incompetency of Tommie Moore, the yard-arm winchman, was of a negative character. It consisted, when reduced to the fewest words, of the testimony of several witnesses that they had never seen him drive a winch, of one who said that he had never seen him drive a winch before. One of the witnesses went further and testified that he was reputed among longshoremen to be a wheat packer. Another witness said that Tommie Moore had told him that he had never run a winch, and another that he had asked him how to run the winch just before the work of loading had started on the occasion of the accident. All of these things may have been true, and yet appellant would not be liable. The testimony relied upon to prove knowledge on the part of the appellant consists of the statements of Madison Fredenberg, who was at the time of the accident hatch foreman and had under his immediate charge all of the men engaged in the work of loading the ship, from the loaders on the dock to the packers in the hold. Fredenberg worked under the direction of one Billy Moore, who was the walking boss and the immediate representative of appellant. His testimony on this point follows:

"Int. 9. Did you ever know a man by the name of Tommie Moore? A. Yes, sir. Int. 10. If you answer the foregoing interrogatory in the affirmative state when you knew him, whether you knew him on or about December 21, 1906, and how long you had known him before that time. A. Knew him December 21, 1906, and for about six months prior to that time. Int. 11. State if you know what his business or occupation was. A. He was a wheat packer. Int. 12. Do you know whether or not Tommie Moore was present on the steamship Nebraskan on the 21st of December, 1906, at the time that the plaintiff George C. Long was injured? A. Yes, sir; he was. Int. 13. State what Tommie Moore was doing at that time. A. He was driving a winch. Int. 14. How long before that time had Tommie Moore been driving a winch, to the best of your knowledge? A. About two weeks, to the best of my knowledge. Int. 15. Who set Tommie Moore to

driving the winch on that day? A. Myself. Int. 16. State if you know what kind of a winch driver Tommie Moore was. A. He was not a competent man; but being a wheat packer, I had to place him there, through instructions from Billy Moore. Int. 17. Did you have any conversation with Billy Moore on the 21st of December, 1906, relative to having Tommie Moore run the winch? A. I did. I spoke to Billy Moore and told him I did not consider Tommie Moore competent to run the big winch. He said leave him there till some one came to run the engine, and then put him in the hold. Int. 18. If you answer the foregoing interrogatory in the affirmative, state fully what the conversation was between you and Billy Moore at that time and when it took place, whether before or after the plaintiff Long was hurt. A. As I said before, I told Billy Moore Tommie was not competent to run the winch. That was before George C. Long was hurt. Int. 19. State whether or not you were working on the steamship Nebraskan on the 21st of December, 1906. A. I was. Int. 20. If you answer that you were, state in what capacity you were working. A. In the capacity of hatch foreman. Int. 21. If you state in answer to any of the foregoing interrogatories that Tommie Moore was not a good, skilled or experienced winch driver, state why you formed that opinion and what opportunity you had to observe his skill as a winch driver, and how many times during your acquaintance you had known him to run a winch. A. I had known Tommie Moore to drive a winch twice. The first time that he drove a winch he drove it for me. He was afraid then he could not run the winch and I showed him how. That is the reason that I formed the opinion that he would never make a winch driver—he was too timid.”

“Cross-Int. 3. If you answer “yes” to interrogatory 15, state how you know who set Tommie Moore to work driving a winch. A. My instructions from Billy Moore were to place all wheat packers to work in preference to any other longshoremen. As Tommie Moore had driven winch for me once before and there were no other drivers around I put him on the job.”

Admitting, for the sake of argument, that Tommie Moore was negligent, it does not follow that he was incompetent so as to charge his employers with knowledge of that fact.

Apr. 1909]

Opinion Per CHADWICK, J.

There is a division of authority on the proposition that opinion evidence is admissible to prove incompetency of a servant. But in a review of the authorities, we do not find any sustaining the doctrine that the mere opinion of a single individual is enough to charge an employer with knowledge of the incompetency of a servant. It cannot be laid down as a matter of law that a competent man is never negligent. Then, if this be so, the opinion of one man who testifies that the servant was timid, but to not one single negligent act or physical fact, as for instance age, habits, bodily or mental qualities, should not be held to conclude the employer or overcome the presumption that the master has done his duty. Unless such knowledge is proven, there can be no recovery. No specific acts or series of acts of negligence were shown, as in the case of *Conover v. Neher-Ross Co.*, 38 Wash. 172, 80 Pac. 281, 107 Am. St. 841, from which the jury would have been warranted in finding that Tommie Moore was incompetent. Plaintiff's case rested entirely, as we have said, upon the negative testimony that he had never driven a winch to the knowledge of plaintiff's witnesses, and the testimony of Fredenberg that he was timid and therefore incompetent, and the testimony of Harris that he had asked him how to run a winch just before the accident.

Respondent relies upon the case of *Seewald v. Harding Lumber Co.*, *supra*, to sustain his case. While the *Seewald* case goes to the extreme limit in fixing the liability of the master, and the conclusion of the court was no doubt correct, we do not think it should be extended in its application beyond the holding there made that, where acts from which incompetency may be inferred are proven, the burden of showing that it had performed its duty to exercise proper care in the selection of its servants shifted to the master. The true rule in such cases is laid down by Bailey, in *Master's Liabilities for Injury to Servants*, p. 55, and quoted with approval in *Green v. Western American Co.*, *supra*, as follows:

"The presumption is that the master has exercised proper care in the selection of the servant. It is incumbent upon the party charging negligence in this respect to show it by proper evidence. This may be done by showing specific acts of incompetency, and bring them home to the knowledge of the master or company; or by showing them to be of such a nature, character and frequency that the master, in the exercise of due care, must have had them brought to his notice. But such specific acts of alleged incompetency cannot be shown to prove that the servant was negligent in doing or omitting to do the act complained of. So it is proper, when repeated acts of carelessness and incompetency of a certain character are shown on the part of a servant, to leave it to the jury to determine whether they did come to the knowledge of the master, or would have come to his knowledge if he had exercised ordinary care. In such case the presumption that the master had discharged his duty may be overcome to such an extent as to call upon him to rebut the proof made showing his negligence."

Assuming, then, that the testimony was sufficient to cast this burden on appellant, the testimony adduced and offered at the trial shows that it amply sustained the charge put upon it by the trial court. Where the burden shifts, the *prima facie* showing which a plaintiff is bound to make must be measured by the evidence of the defendant rather than by any fixed rule of law.

"When the party who has the affirmative of an issue has succeeded in making out a *prima facie* case he has relieved himself for the time being of the necessity of producing evidence; for, unless the adverse party now goes forward with evidence, this *prima facie* case naturally results in an established case upon all the evidence. In other words, this duty of introducing evidence is shifted by a *prima facie* case in the first instance, and back again by counter evidence which meets and destroys the *prima facie* case, and so on. And this is what the authorities mean when they say that the burden of proof shifts during the progress of a trial." 5 Ency. Plead. & Prac., p. 39.

In other words, as against a motion for a judgment at the close of plaintiff's case and renewed at the close of all the

Apr. 1909]

Opinion Per CHADWICK, J.

evidence, a *prima facie* showing is to be determined as a matter of law by the court in the light of the explanations made by the defendant. The duty of measuring the evidence, not as to its weight but its legal effect, is put upon the court. What may have been evidence *prima facie*, may not be so when rebutted by other evidence. The negative testimony must give way to the positive evidence. The testimony to overcome the case made by appellant shows that Tommie Moore had driven winch off and on for over twenty years; that he had been engaged at steamborting and stevedoring since 1887; that he was a man over forty years of age; that he had found employment as a winchman on the following vessels: The Nebraskan, the Quito, the Tremont, the Shawmut, the Princess Louise, the Kumeric, the American Whale, and other vessels the names of which the witnesses could not remember; that he had driven winch for several hours on a vessel with plaintiff; that he had a good reputation as a winchman. One witness who qualified as a winchman of experience, and who was permitted to testify by the court, said that he had seen him engaged in driving winch and that he was a competent winch driver. It was further shown by a number of stevedores who had had years of experience in tending hatch that it was a fixed custom among winchmen to carry an empty sling out of a hold and right on out over the deck without stopping for another signal, when clear of the hatch, and that although the sling had been stopped twice in succession, it was still the duty of the winch tender under such custom to carry the sling right on out. This testimony is entitled to added weight from the fact that plaintiff undertook to show that the custom was otherwise, and finds further support in the fact that at the particular time Harris, the midship winchman, reversed his winch and laid out his fall line without signal from the plaintiff. Therefore, if we should admit that the theory of the lower court that a *prima facie* case, showing the incompetency of Tommie Moore and knowledge of such incompetency on the part of

the master, was made out and that appellant should for that reason go on with its case, yet nevertheless the burden of sustaining his case by a preponderance of the evidence being still on respondent, we conclude, in the light of all the evidence, that there was no testimony tending to show that Tommie Moore was incompetent, or if so, that appellant was in any degree remiss in its duty to make reasonable effort to ascertain the qualifications of a servant engaged to work in fellowship with others. This conclusion makes it unnecessary for us to discuss questions of contributory negligence and assumed risk argued by appellant in its brief, as well as errors in the rejection of testimony which would in any event compel a reversal of this case.

The judgment of the lower court is reversed, with directions to enter judgment in favor of appellant.

RUDKIN, C. J., GOSE, MOUNT, and CROW, JJ., concur.

FULLERTON, J. (dissenting)—I am unable to concur in the foregoing opinion. Manifestly there was a conflict in the evidence both as to the competency of the winchman Moore, and as to the knowledge the master had of his incompetency. The question, therefore, was for the jury, and this court usurps its functions when it sets aside the jury's findings thereon. The judgment should be affirmed.

DUNBAR, MORRIS, and PARKER, JJ., took no part.

Apr. 1909]

Opinion Per DUNBAR, J.

[No. 7762. Decided April 5, 1909.]

N. T. JOLLIFFE, *Appellant*, v. NORTHERN PACIFIC RAILROAD
COMPANY, *Respondent*.¹

CARRIERS—OF GOODS—DELAY IN SHIPMENT—STIPULATIONS IN CONTRACT—NEGLIGENCE OF DEFENDANT—BURDEN OF PROOF—PRESUMPTION FROM UNUSUAL DELAY. The fact of unusual delay in the shipment of horses makes a *prima facie* case of negligence against a carrier, under a contract in which the shipper assumed all risks of delay in transportation, where it was recognized that the carrier could not relieve itself from acts of negligence by a further clause exempting the company from liability except for acts of negligence; since the cause of the delay is peculiarly a matter within the knowledge of the defendant and out of the reach of the plaintiff.

SAME—DAMAGES FROM DELAY—EVIDENCE—SUFFICIENCY. In an action for damages from unusual delay in shipping horses, causing shrinkage preventing immediate sale, the evidence of the amount of the damage sustained is sufficiently definite to make a case for the jury, where it appears that an unusual amount of shrinkage was caused by the delay, requiring the keeping and feeding of the horses a longer time than usual before they could be sold, costing at the rate of \$15 per month for care and keep.

Appeal from a judgment of the superior court for King county, Albertson, J., entered May 27, 1908, upon granting a nonsuit, after a trial before the court and a jury, in an action to recover damages from delay in the shipment of horses. Reversed.

Sayre & Sutherland, for appellant.

Carroll B. Graves, for respondent.

DUNBAR, J.—On September 27, 1907, the plaintiff shipped a car load of horses at Grafton, North Dakota, to be transported over the lines of the Northern Pacific Railway Company to Seattle, Washington. The shipment reached its destination on October 13, having been en route about sixteen days. This action is for damages for injury to the

¹Reported in 100 Pac. 977.

horses, most of the damages being alleged to have been caused by the delay of the cars, it being conclusively shown that the cars were unduly delayed. It is not necessary to mention specifically the particular delays charged. The shipment was under a written contract, and it is the contention of the plaintiff that the delays, being unreasonable, were due to negligence of the defendant, and that the horses shrunk an unusual amount by reason of these delays, thereby depreciating in value and necessitating their being cared for from one to three months before they were fit to sell. At the close of plaintiff's case, the court granted defendant's motion for a nonsuit, and thereafter overruled plaintiff's motion for a new trial. Judgment was entered and appeal followed.

In the trial of the cause the appellant sought to testify as to the cause of the delay, and what he was informed by the train men was the cause of said delay. This was objected to, and the appellant was only allowed to testify to what he knew of his own knowledge. This is assigned as one of the errors in the case. The main contention in this case is founded on the following statement in respondent's brief, viz.: That a carrier is only bound to use ordinary care and diligence to avoid unreasonable delay, and the fact that there is an unusual delay does not of itself show a breach of duty in showing whether or not there was a negligent delay. The respondent says:

"While it is not contended that a carrier can contract against its own negligence, yet such stipulations as these, in a contract of this character, are upheld except where the attempt is made to contract against negligence; and in order for the shipper to avoid the effect of such a stipulation, the burden is upon him to prove that the act complained of is the negligent act of the carrier. In this case, and under this stipulation, it is not sufficient to show the mere fact of a delay, but the plaintiff must go further and affirmatively show that such delays were caused by the negligence of the carrier. In the absence of a special contract limiting his liability, the carrier must affirmatively show that the loss was occasioned by some cause for which he was not responsible,

Apr. 1909]

Opinion Per DUNBAR, J.

but where there is a limited liability contract, and the loss falls within one of the excepted clauses, the burden of proof is upon the shipper to show negligence. The presumption, in the absence of proof to establish negligence, will be that the carrier has done his duty."

This was the theory accepted by the court and the theory upon which the cause was tried. The stipulation referred to in the contract is to the effect that the shipper assumes all the risk of damage he may sustain by reason of any delay in such transportation. Some cases are cited by the respondent which sustain this contention; but they are not founded on reason or justice, and we are therefore not inclined to follow them. It will be seen from this contract that this is in effect, if construed as it has been construed by the respondent, a contract relieving the shipper from its own acts of negligence, thereby running directly counter to the first clause in the contract, which reads as follows:

"The company shall not be liable for the loss or death of or injury to the stock unless the same is caused by the negligence of the company, its agents or employees."

So that it will be seen that this contract recognizes the general principle that the shipper has no right to relieve itself by contract against acts of negligence on its part. The reason we say that the provision relied upon by the appellant is in effect a provision where an attempt is made to contract against negligence, is that there would be no way, if this provision were literally construed, by which the shipper could show negligence, because he has made himself actually responsible for all damages which may be sustained by reason of any delay in the transportation. In this case, appellant was asked if he knew the cause of the delay, and when he undertook to state what the train men told him, was prevented from so stating, and if this was a correct holding—a question upon which we do not pass—it shows the absolute injustice of the rule. For how can a man who has no knowledge of railroading, no way of ascertaining the manner in

which the business is conducted by the company, or of compelling the confidence of the management, tell the cause of the delay? It is true that in this instance the shipper accompanied the horses, but railroad companies do not usually establish their bureaus of information either in a horse car or a caboose, the only apartments in the train which were available to the shipper. A car may be sidetracked and delayed for an hour, or for twenty-four hours, by order of the train dispatcher or some one in authority hundreds of miles away, for a necessity which is apparent to him; and that necessity may have been brought about by negligence in the intricate management of the business by some responsible agent of the company a long distance from the location of the train which is sidetracked. There certainly can be no semblance of justice in relieving the party from making a disclosure who is in a position to make it, or in making an explanation which will excuse it if there be such an explanation available to him.

This court and other courts have frequently said that, where it is necessary to make a character of proof which, by reason of the circumstances surrounding the case, is exclusively within the knowledge of one or the other of the parties, the burden would be upon the party possessed of that knowledge to make the proof; and that is exactly the case here. This rule, which it is admitted by the respondent applies under the ordinary contracts, was no doubt based upon the reasons which we have just assigned. The reason for the rule has not in the least been changed by the modification in the contract, for the cause of the delay is just as difficult to prove, and just as much without the knowledge of the shipper and within the knowledge of the carrier, as it was under the regular contract. The fact that risks are assumed by the shipper which were not assumed under some other contract, can in no way affect the rule or the reason for it.

The court was also of the opinion that the proof of damages was not sufficiently definite to enable the jury to determine the amount thereof. But while the proof of damages

Apr. 1909]

Statement of Case.

in many respects was somewhat cloudy, there certainly was testimony to the effect that, by this unusual delay, an unusual amount of shrinkage of all the horses would occur, and that they would have to be kept a longer time before they could be sold, and the testimony was definite and certain that all the horses had to be fed and cared for this extra length of time, and that it actually cost the respondent at the rate of \$15 a month for such extra care and keep.

The judgment will be reversed, and a new trial granted.

RUDKIN, C. J., FULLERTON, CROW, MOUNT, and GOSE, JJ.,
concur.

CHADWICK, J., concurs in the result.

PARKER and MORRIS, JJ., took no part.

[No. 7812. Decided April 5, 1909.]

CARL GOLLE, *Respondent*, v. STATE BANK OF WILSON CREEK
et al., *Appellants*.¹

CANCELLATION OF INSTRUMENTS—DEEDS—FRAUD—EVIDENCE—SUFFICIENCY. There is no such clear, unequivocal and convincing evidence as to warrant the setting aside of a quitclaim deed, on the ground that the grantor supposed it to be a guaranty of a debt, and signed it without reading because he did not have his glasses, and the grantor is guilty of negligence precluding relief, where it appears that he had lived in this country forty years, could read and speak English, was engaged in business, had average experience and had conveyed property, and did not read the deed or ask to have it explained; the cashier of the grantee testifying that the deed was given voluntarily as security for the debt.

DEEDS—CONSIDERATION—SEAL. A deed under seal imports a consideration.

Appeal from a judgment of the superior court for Douglas county, W. M. Clapp, Esq., judge *pro tempore*, entered July 6, 1908, upon findings in favor of the plaintiff, after a

¹Reported in 100 Pac. 984.

trial on the merits before the court without a jury, in an action to cancel a deed. Reversed.

W. E. Southard and C. J. Lambert, for appellants.

Sam B. Hill, for respondent.

RUDKIN, C. J.—On the 8th day of July, 1903, the plaintiff in this action conveyed the property now in controversy to the State Bank of Wilson Creek by a quitclaim deed reciting a consideration of \$500. On the 25th day of May, 1904, the State Bank of Wilson Creek, conveyed to the Citizens Bank of Wilson Creek by a like instrument. This action was instituted against the two banks to set aside the above mentioned deeds on the ground that the former was obtained through fraud and misrepresentation. From a judgment in favor of the plaintiff according to the prayer of his complaint, the present appeal is prosecuted.

It appears that, at the time the first-mentioned deed was executed, the respondent and one Kemp were engaged in the saloon business at Wilson Creek, as copartners, the business being conducted on the lots in controversy. Kemp was indebted to divers persons and corporations, including the State Bank of Wilson Creek, in considerable sums. To the latter institution he owed the sum of \$550, evidenced by two promissory notes upon which certain small interest payments had been made. The respondent testified, in substance, that the cashier of the bank had importuned him on several occasions to secure the Kemp indebtedness to the bank by mortgage, but that he had refused to do so; that he finally agreed to guarantee the payment of a certain \$200 note to the bank, and that he signed and executed the quitclaim deed in controversy, assuming and believing that it was some kind of a contract of guaranty.

The assistant cashier of the bank, on the other hand, testified that the quitclaim deed was executed to secure the payment of the two promissory notes above described; that the deed was executed freely and voluntarily, and that the re-

Apr. 1909]

Opinion Per RUDKIN, C. J.

spondent read, or at least looked over, the deed before signing. We find little in the record to corroborate or contradict either of these witnesses. The respondent is a German by birth, but has lived in this country for upwards of forty years. He has a fair education in his own language, and can both read and speak the English language. Property has been conveyed to him by deed or patent on at least three different occasions during his lifetime, and he had twice before conveyed property of his own. He was engaged in the saloon business for three years in the state of Nebraska, and was engaged in the same business in this state at the time the deed was executed. He carried a bank account and had at least average experience in the common affairs of life. He says he did not read the deed before signing it, nor did he ask to have it read to him. The only excuse he offered for not reading the deed himself was the fact that he did not have his glasses with him, and he offered none for not having the deed read or explained to him. We think this testimony was entirely insufficient to warrant the court in granting the relief prayed for.

As said by this court in *Sahlin v. Gregson*, 46 Wash. 452, 90 Pac. 592: "If this judgment is permitted to stand, deeds and other written instruments have lost their chief virtue." In actions of this kind the authorities all agree that the proof on the part of the party seeking to defeat the operation of his deed must be clear, unequivocal and convincing. *Dabney v. Smith*, 38 Wash. 40, 80 Pac. 199; *Reynolds v. Reynolds*, 42 Wash. 107, 84 Pac. 579; *Johnson v. Conner*, 48 Wash. 431, 93 Pac. 914. Furthermore, the failure of the respondent to read the deed or have the same read to him, under the circumstances disclosed by this record, shows such negligence on his part as to place him beyond legal or equitable relief. *Hubenthal v. Spokane & Inland R. Co.*, 43 Wash. 677, 86 Pac. 955.

It is further claimed that there was no consideration for the deed because it was given to secure a preexisting indebtedness, and there was no extension of time or other new con-

sideration, but the deed was under seal and the seal itself imports a consideration. *Considine v. Gallagher*, 31 Wash. 669, 72 Pac. 96; *Monro v. National Surety Co.*, 47 Wash. 488, 92 Pac. 280.

The judgment should therefore be reversed with directions to dismiss the action, and it is so ordered.

ALL CONCUR, except PARKER and MORRIS, JJ., who took no part.

[No. 7469. Decided April 6, 1909.]

THE STATE OF WASHINGTON, *on the Relation of Northern Pacific Railway Company, Respondent*, v. RAILROAD COMMISSION OF WASHINGTON, H. A. FAIRCHILD *et al.*, Appellants.¹

CARRIERS—REGULATION OF RATES—RAILROAD COMMISSION—PLEADING—COMPLAINT—ISSUES. In a proceeding before the state railroad commission to change freight rates, an order as to commodities not mentioned in the complaint is void, as the commission can change rates only upon complaint made and a full hearing.

Appeal by the state railroad commission from a judgment of the superior court for Thurston county, Linn, J., entered February 19, 1908, in favor of the relator, annulling an order of the commission establishing certain terminal freight rates, upon certiorari to review the order of the commission. Affirmed.

John D. Atkinson, Attorney General, *J. B. Alexander*, *I. B. Knickerbocker*, and *E. C. Macdonald*, Assistants, for appellants.

B. S. Grosscup and *Geo. T. Reid*, for respondent.

MOUNT, J.—This appeal is taken by the railroad commission from an order of the superior court of Thurston county, adjudging an order of the railroad commission, establishing

¹Reported in 100 Pac. 987.

Apr. 1909]

Opinion Per MOUNT, J.

a terminal rate on hay, oats, barley, and mill feed from points on the line of the Northern Pacific Railway Company to Bellingham, Aberdeen, Hoquiam, and South Bend, null and void. In May, 1907, a complaint was filed by the railroad commission against respondent and other railway companies, charging that certain rates were unreasonable and excessive. A citation was issued and served upon all the companies named in the complaint. All appeared and answered. Evidence was taken by the commission on many questions, and final findings of facts were made, and an order followed fixing certain joint rates on wheat and potatoes from certain zones to certain points in the state, and ordering certain track concessions, and fixing the rate on hay, oats, barley, and mill feed shipped over the line of the Northern Pacific Railway Company from eastern Washington points to points on Grays Harbor, South Bend, Bellingham, and other branch lines in western Washington, the same as the rate charged to Kalama. The Northern Pacific Railway Company thereupon obtained a writ of review from the superior court of Thurston county to review this finding and order of the railroad commission relating to the rate on hay, oats, barley, and mill feed. The record was certified to the superior court, and upon a hearing, that court found that the order of the railroad commission, fixing the rate on hay, oats, barley, and mill feed, was void. This appeal is prosecuted by the railroad commission from that part of the order.

We find nothing in the complaint of the railroad commission which can justify the order of the commission on the commodities named. The only place where hay, oats, barley, and mill feed are mentioned in the complaint is in paragraph 24 thereof, and it is there stated that a joint rate exists on hay, oats, barley, and mill feed from eastern Washington to Seattle and Tacoma, for a continuous haul from points contiguous and equidistant from Seattle and Tacoma; that wheat bears the same classification as those commodities, and that

the exclusion of wheat from such joint rate is unreasonable. Paragraph 25 of the complaint reads as follows:

"That the towns of Aberdeen and Hoquiam in Chehalis county on Grays Harbor are flourishing towns, being distant from each other five miles more or less, and have a joint population exceeding twenty thousand people, and are growing and increasing in population with great rapidity; that there are good shipping facilities at such points and large shipping interests, and said points contribute largely to the revenue of the Northern Pacific Railway Company. That South Bend on Willapa Harbor in Pacific county is a prosperous city and contributes largely to the revenue of the Northern Pacific Railway Company. That the city of Bellingham in Whatcom county is a city having a population exceeding 35,000 people, and is on the line of the Great Northern Railway Company, the Northern Pacific Railway Company and the Bellingham Bay & British Columbia Railroad Company. That each of the towns and cities mentioned in this paragraph are desirous of establishing flouring mills, but by reason of their being compelled to pay in addition to the terminal rates to Seattle or Tacoma, the local rate from Seattle or Tacoma to such towns and cities, they are prohibited from establishing at such points flouring mills, to the great detriment of the cities and the inhabitants thereof. That each of said cities on all eastern interstate shipments is recognized as a terminal city, and is accorded the same rates that are accorded Tacoma and Seattle, by the Northern Pacific Railway Company, and Bellingham is accorded the same rates by the Great Northern Railway Company. That in addition thereto the Great Northern Railway Company accords to the city of Bellingham the same rates on all shipments of grain originating on its main line east of the Cascade tunnel as are accorded Seattle. That the Northern Pacific Railway Company has refused and still refuses to accord to the cities of South Bend, Aberdeen, Hoquiam, and Bellingham, terminal rates on grain consigned from points in eastern Washington, but charge the terminal rate to Seattle or Tacoma and then the local rate from there to the point designated, and that such rule, regulation and rate is unreasonable and discriminatory against the points named. And the Great Northern Railway Company refuses

Apr. 1909]

Opinion Per MOUNT, J.

to accord the city of Bellingham terminal rates on grains and cereals originating on its branch lines and off its main line, thus discriminating against the city of Bellingham; and that the rates charged to Seattle and Tacoma over the defendant roads would be and is a sufficiently remunerative rate and charge to be made for transporting freight to South Bend, Aberdeen, Hoquiam, and Bellingham, whether said rate be joint or otherwise."

The paragraphs of the prayer of the complaint relating to the subject under consideration states that notice be given to the railway companies of the time and place of hearing, to the end that orders may be entered establishing a joint rate on wheat from eastern Washington points to points on Puget Sound, Grays Harbor, and Willapa Harbor. We find nothing in the complaint which indicates that there was any complaint about the rates on hay, oats, barley, and mill feed, or that there would be any hearing or any investigation of the rate on these commodities between points in eastern Washington and points on the western Washington branch lines of the Northern Pacific Railway Company. The most that can be claimed of paragraphs 24 and 25 of the complaint is that the allegations there would justify an order fixing a joint terminal rate on wheat from eastern Washington points to Aberdeen, Hoquiam, South Bend, and Bellingham. But the commission on that point found as follows:

"As to that portion of the complaint asking that a joint terminal rate be extended to points on Grays Harbor, Willapa Harbor, and Bellingham Bay, the commission feel that by reason of the additional haul it would not be justified in extending an order to such points."

In the case of *State ex rel. Great Northern R. Co. v. Railroad Commission*, 47 Wash. 627, 92 Pac. 457, we held that the commission was authorized to fix rates only upon complaint made and after a full hearing. As we have seen above, no complaint was made against the existing rates on hay, oats, barley, and mill feed to Grays Harbor points, and no hearing was or could have been had thereon, and the com-

mission was not authorized to make an order therein changing such rates.

The order of the superior court was therefore right, and it is affirmed.

FULLERTON, CHADWICK, GOSE, DUNBAR, CROW, PARKER, and MORRIS, JJ., concur.

[No. 7668. Decided April 6, 1909.]

L. A. GASAWAY, *Respondent*, v. THE CITY OF SEATTLE,
Appellant.¹

EMINENT DOMAIN—PROCEEDINGS—PROCESS—WAIVER OF OBJECTIONS TO SERVICE. In eminent domain proceedings by a city, objection to the sufficiency of the service of process upon the owner will not be considered after the assignee of the owner has accepted and received the award of compensation for the land taken.

EMINENT DOMAIN—NATURE—STRICT PUBLIC USE—EFFECT—TAXATION—DISCHARGE OF TAX LIEN. The power to condemn land for the use of the state being an attribute of sovereignty, recognized, not granted by the constitution, the state may provide for condemnation for a strict, as distinguished from a quasi public use, that will discharge the land from liens for unpaid taxes.

EMINENT DOMAIN—PROCEEDINGS—NECESSARY PARTIES. A proceeding to condemn property is *in rem*, and the only necessary parties are those named by the statute.

SAME—"PERSONS INTERESTED"—COUNTY HOLDING TAX LIEN—STATUTES—CONSTRUCTION. Under Laws 1903, p. 189, providing that a condemnation by a city of the first class shall proceed against the owners and occupants of the land and "persons having an interest therein so far as known to the officer filing the petition or appearing from the records in the office of the county auditor," a county having a lien for taxes assessed and unpaid is not a necessary party defendant, since the city is not obliged to go beyond the knowledge of its officer and the county auditor's records, and the county is not a "person interested" within the meaning of the act.

TAXATION—VESTED RIGHTS—PUBLIC PROPERTY—DISCHARGE OF LIEN BY EMINENT DOMAIN PROCEEDINGS. As there can be no vested right to enforce the collection of taxes, and as public property is not subject to taxation, a county cannot enforce a tax lien against property after it is relieved therefrom by the state's taking the same over as public property under eminent domain proceedings.

¹Reported in 100 Pac. 991.

Apr. 1909]

Opinion Per CHADWICK, J.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 25, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to recover real property and to quiet title. Reversed.

Scott Calhoun and Bruce C. Shorts, for appellant.

Louis Henry Legg and A. C. McDonald, for respondent.

CHADWICK, J.—Plaintiff brought this action to recover from defendant, the city of Seattle, certain lands held by it under condemnation proceedings. The land sought to be recovered consists of three tracts, and together they comprise a part of the right of way and water-shed acquired by the city in connection with its Cedar river water system. One of these tracts was acquired by condemnation proceedings in July, 1896; the others by like proceedings in 1901. In each case the value of the property as assessed by a jury was paid into the office of the clerk of the superior court. The assignee of the owner received, receipted for, and accepted as compensation, the amount so found to be due. Because of these facts we shall not consider the sufficiency of the service upon the owner of the property, although the point was raised by plaintiff upon the trial by objection to the introduction of testimony.

At the time the condemnation suits were prosecuted in the lower court, there had been levied taxes which were then due, delinquent, and unpaid. In one of the condemnation suits the county of King was made a party, and service was had upon the county auditor. In the other it was not made a party, and so far as the record shows it had no actual notice of the condemnation suits. Thereafter King county brought an action to establish and foreclose its lien for taxes, and after the usual proceedings the treasurer of King county deeded the several tracts of land, a part of which the city had condemned, and was then in possession of, to plaintiff's grantor, who on October 4, 1904, conveyed all his interest in the land

to the plaintiff. The lower court made findings in favor of the plaintiff, and entered judgment "that the claim to ownership of the said lands and every part thereof of the defendant is without right, and the title to said lands and every part thereof is hereby quieted and set at rest in the plaintiff against every claim of the defendant or any one claiming by or through it;" from which judgment defendant has appealed.

The only question for us to decide is whether the tax lien of the county of King is superior to the right of the city of Seattle to condemn and take property for a public use. Appellant takes the position that, in the acquisition of land for public use, no greater duty is put upon it than is expressly provided in the statute. Chapter 84, Laws 1898, p. 189, governing condemnation suits by cities of the first class, provides (§ 4) that actions prosecuted under its provisions shall proceed in the names of the owners and occupants of the lands and all persons having an interest therein. It is apparent that the legislature took no concern of a tax lien, or if it did, the city insists that, by virtue of the condemnation proceedings which it strictly complied with, it took the property discharged of all claims and liens whatsoever, including that of the county, and if a lien for taxes survived, it attached to the fund paid into court as compensation for the land taken. In the case of *Puyallup v. Lakin*, 45 Wash. 368, 88 Pac. 578, this court held that personal property acquired by the city of Puyallup by purchase was liable for a tax that had been assessed before the city acquired its title.

"The second contention, that the property is not taxable because devoted to public use, we think cannot be sustained. If the property had a lien upon it when it was purchased by the municipality, the municipality like an individual would take the property subject to the lien. The collection of the tax might be an idle thing if all the assessment that was due on the property would go to the municipality, but such is not the case. A portion of the money is due to the state, a portion to the county, and a portion to the school district,

Apr. 1909]

Opinion Per CHADWICK, J.

and such incorporations are entitled to their share of the money due."

The lower court followed that case, and were it not for the act of 1893, which seems to grant a greater power to, as well as confer a greater benefit upon, cities of the first class, to which it is made applicable, than it does to *quasi* public corporations exercising the right of eminent domain, we would be inclined to hold that case controlling. This case seems to be one of first impression, and a recurrence to fundamental principles is necessary to fully elucidate the distinctions which we shall draw between it and the *Puyallup* case. The power to condemn land for a public use is in the state of Washington. If it is exercised by others, it must be by reason of some constitutional or statutory provision. It is not so with the state. The power to condemn land is an attribute of sovereignty. "It is a power recognized, not granted, by the constitution." *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670. The right to exercise this endowment of the state may lie dormant. Its exercise depends upon an expression of the legislative will or sanction. A municipal corporation could not exercise it unless expressly authorized by the legislature. *Tacoma v. State*, 4 Wash. 64, 29 Pac. 847; *Long v. Billings*, 7 Wash. 267, 34 Pac. 936; 10 Am. & Eng. Ency. Law (2d ed.), p. 1049.

Vattel, in *Le Droit des Gens*, Lib. 1, Ch. 20, par. 244, lays down the primary rule as follows:

"In political society everything must give way to the common good, and even if the person of the citizen is subject to this rule, their property cannot be excepted. The state cannot live or continue to administer public affairs if it have not the power to dispose of every kind of property under its control."

All of our statutes extending this power to municipal and public service corporations are drawn in conformity with the rule that it is a proceeding *in rem*, and that it is not necessary

to look beyond those named in the statute in the prosecution of these proceedings. Bal. Code, § 5637 (P. C. § 5102); 7 Ency. Plead. & Prac., 503. The law (1873, p. 190, § 4) says what the petition for condemnation of land shall contain and who shall be made parties. "The owners and occupants thereof and of persons having any interest therein, so far as known, to the officer filing the petition or appearing from the records in the office of the county auditor." In order to uphold the title of respondent, we would be compelled to hold that King county, to which the like sovereign power of the state to levy and collect taxes has been delegated, is a necessary party in all cases prosecuted under this act, when a tax has been assessed and is unpaid. Under statutes providing that the petition should name the owner or owners, those holding equitable interests, mortgagees and lienholders, have been held to be unnecessary parties. It is only under statutes providing that interested parties shall be brought in that they are held to be proper parties.

The question reduces itself to the question whether the county, by reason of its tax lien, is a person having an interest therein, within the meaning of the act. We think not. The object of § 4 was to bring before the court, the owners, occupants (*Owen v. St. Paul etc. R. Co.*, 12 Wash. 313, 41 Pac. 44), mortgagees, and such others as the records in the office of the county auditor might show had an interest in the land or the compensation to be paid therefor; not that they might defeat the action, for the public use being determined, no defense would lie, except as to the amount of damages; but that the fund to be paid into court may be properly and finally disposed of. By design or oversight the legislature has taken no account of the "interest," if it may be so called, of the county. The statute was probably drawn on the theory that a municipal corporation exercising the sovereign power of the state, being itself a political subdivision of the state, could take land under the power of eminent domain without regard to taxes or tax liens, for if the state could so

Apr. 1909]

Opinion Per CHADWICK, J.

take land, it can delegate the power, and in the absence of an express reservation, it must be held that the city has acquired the full power possessed by the state. This court has held that, although the legal title to land held under an executory contract of sale is in the state of Washington, the state is not a necessary party, because the interest of the state is not subject to condemnation, although the interest of its vendee under such contract may be. In *State ex rel. Trimble v. Superior Court*, 31 Wash. 445, 464, 72 Pac. 89, 66 L. R. A. 897, this court said:

"While it is true that the state holds the naked legal title to these tide lands as trustee for the relators and their assigns, and is, to that extent, interested therein, it is also true that it is no more concerned in the condemnation suit than it would be in a voluntary transfer by the relators of their interest to the respondent herein. The state cannot be involuntarily deprived of its title by condemnation or otherwise, and the fact that it was not made a party to the proceeding cannot affect its rights or those of the relators in any manner or degree whatever. All that the relators are entitled to is just compensation for their interest in the land, and such compensation can readily be determined without regard to the rights of the state or any other person or party."

See, also, *North River Boom Co. v. Smith*, 15 Wash. 138, 45 Pac. 750; *Seattle & Montana R. Co. v. State*, 7 Wash. 150, 34 Pac. 551, 38 Am. St. 866, 22 L. R. A. 217.

If the state is not a necessary party in interest, it would seem that the county to whom it has delegated its power to collect the public revenues, is likewise devoid of interest within the meaning of the law. The condemnation suit goes no further than to fix the damages and transfer title between the condemning party and the owner. Unquestionably the original action was sufficient to divest the title of the record owner. The city was not bound to go beyond the limit of knowledge possessed by its officers and the records in the auditor's office. By complying with the statute it took so much of the several tracts bought by respondent as the su-

perior court had determined was necessary for the public use. The land being taken for a strict, as contra-distinguished from a *quasi*, public use, was discharged *pro tanto* of the tax lien. The property became public property. Public property is never taxed, and property possessed of that character is, under a statute like the one under consideration, of necessity freed of the burdens imposed in the individual. The general rule is that the omission of any proper party will not invalidate the proceedings as against such persons as are made parties. *State ex rel. Trimble v. Superior Court*, *supra*; 7 Ency. Plead. & Prac., 504. It is a necessary deduction from the premises that the city took the full fee simple title and the interest, both present and prospective, of all concerned in the property. Proper apportionment of the fund between the true owner and the one entitled to a part thereof can be had by timely application to the court making the award. Lewis, Eminent Domain, 1348; *Watson v. New York Cent. R. Co.*, 47 N. Y. 157; *Yakima Water L. & P. Co. v. Hathaway*, 18 Wash. 377, 51 Pac. 471; *Armstrong v. Moore*, 1 Kan. App. 450, 40 Pac. 834; *United States v. Dunnington*, 146 U. S. 338, 13 Sup. Ct. 79, 36 L. Ed. 996; *Crane v. Elizabeth*, 36 N. J. Eq. 339; *Ross v. Adams*, 28 N. J. L. 160; *Chicago etc. R. Co. v. Sheldon*, 53 Kan. 159, 35 Pac. 1105.

The whole tenor of the act sustains this conclusion. It provides (§ 17) that when it appears that the compensation has been paid to the person entitled thereto, or paid into court, the court "shall enter an order that the city shall have the right at any time thereafter to take possession of or damage the property in respect to which such compensation shall have been so paid or paid into court as aforesaid." And in § 13, that

"No delay in ascertaining the amount of compensation shall be occasioned by any doubt or contest which may arise as to the ownership of the property, or any part thereof, or as to the interests of the respective owners or claimants,

Apr. 1909]

Opinion Per CHADWICK, J.

but in such case the court may impanel a jury to ascertain the entire compensation or damage that should be paid for the property or part of property, and the entire interests of all the parties therein, and may require adverse claimants to interplead, so as to fully determine their rights and interests in the compensation so ascertained. And the court may make such order as may be necessary in regard to the deposit or payment of such compensation;"

thus showing that the legislature had in mind the paramount necessity of cities of the first class to provide for the health, comforts and convenience of congested populations. All taxes are levied under the express or implied power of the state. The state can fix the subject of taxation and exempt property. It can limit or extend the time of payment. The authority so delegated, when exercised, is none the less the execution of the state's power. If it can do all these things, it can take away not only the power to tax but the subjects of taxation as well. No person or municipality can acquire, as against the state, a vested right to taxes, or the right to insist upon the collection of taxes when levied.

The city having taken the full title, the county had nothing to sell under its foreclosure proceedings. Its right was limited to the sale of the interest of the owner. At the time he had no interest. "No one can obtain an interest in the land sold that the defendant in the tax suit never held or owned." *Moore v. Woodruff*, 146 Mo. 597, 48 S. W. 489. Where land was sold as the property of an individual, but was in fact owned by the state, the supreme court of Ohio held,

"The title to these lands being in the state, the auditor of Warren county had no authority to put the lands upon the duplicate for taxation, and the tax sale and the deed of the auditor were void, and conferred no right upon the purchasers to hold the lands." *State v. Griftner*, 61 Ohio St. 201, 55 N. E. 612.

On July 6, 1867, certain property was sold to the state of Mississippi for the nonpayment of taxes. In 1870, the same

property was sold to the levee board for levee taxes claimed to be due thereon. One Mary G. Baskett bought the tax title held by the board. It was held that she took nothing by her deed as against the state's grantee, upon the theory that public property was not subject to sale for taxes. *Ricks v. Baskett*, 68 Miss. 250, 8 South. 514. Art. 7, § 2 of the constitution, provides that the property of the United States and of the state, counties, and school districts and other municipal corporations shall be exempt from taxation. The purpose of this provision needs no argument to make it plain. It is enough to say that the whole people have said that property once acquired by a political subdivision of the state shall not be taken or its use impaired by sale to satisfy a tax. The logical conclusion from these observations is that, if property owned by a municipal corporation is not subject to a tax, property taken over by it under a statute that vests absolute title cannot be sold to satisfy a tax. To hold otherwise would defeat the resolution of the people to preserve the character of property when once dedicated to a public use.

In *Puyallup v. Lakin*, *supra*, the property was purchased under a contract. The law of eminent domain and the special statute upon which this case rests were not under consideration. The city had the right of contract and, in the absence of any law exempting it from the burdens of its trade, it was bound to meet them. The difference between that case and this is that the one rests in simple contract, the other is sustained by the sovereign power of the state. We are unwilling to extend the doctrine announced in the *Puyallup* case. Our attention is directed to that class of cases holding that a lien for general taxes is paramount over a lien of lesser degree. *Pennsylvania Co. v. Tacoma*, 36 Wash. 656, 79 Pac. 306; *Ballard v. Ross*, 38 Wash. 209, 80 Pac. 439. Reference to the cases cited and others referred to therein will show that the question before the court was the comparative strength of two liens, each created under the warrant of a statute. The court held that the one sustained

Apr. 1909]

Syllabus.

by the greater interest was paramount over the one supported by the lesser interest. But none of the cases go so far as to hold that a tax lien of any kind is paramount to the right of the state to abolish it or to legislate it out of existence, as in our opinion it has done in the case at bar.

The judgment of the lower court is reversed.

FULLERTON, GOSE, CROW, and MOUNT, JJ., concur.

MORRIS and PARKER, JJ., took no part.

[No. 7637. Decided April 7, 1909.]

ANNA M. DAVISON, *Appellant*, v. THE CITY OF WALLA
WALLA, *Respondent*.¹

MUNICIPAL CORPORATIONS—ORDINANCES—PLEADING—REPLY—ISSUE RAISED. Where an answer alleges that a city ordinance was duly passed, a denial in the reply merely questioning the power of the city to pass the ordinance, does not put in issue the regularity of the preliminary steps leading up to its passage.

SAME—POLICE POWER—FIRE LIMITS. A city may enforce provisions respecting fire limits under its police power without resorting to judicial proceedings.

SAME—PROVISIONS OF CHARTER—VALIDITY OF FIRE LIMITS—ORDINANCE—REPAIR OF DAMAGED BUILDING. Under a charter provision authorizing a city to prohibit, within fire limits, the erection of any wooden building or addition, and to provide for their removal if erected contrary to such provision, the city council has power to pass an ordinance creating fire limits and prohibiting the repair of any wooden building therein that had been damaged by fire to the extent of 30 per cent of its value.

SAME—CONSTRUCTION OF ORDINANCE—SUPERSTRUCTURE AS BUILDING. Damage by fire to the "extent of thirty per cent of the value" of a wooden building which rested on a concrete foundation, within the meaning of a fire limits ordinance, has reference to thirty per cent of the value of the superstructure, exclusive of the foundation, where the regulations as to fire limits authorized the construction of buildings the outer walls of which were made of brick and mortar and iron, or stone and mortar; since the foundation was within the requirements.

¹Reported in 100 Pac. 981.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered May 5, 1908, in favor of the defendant, dismissing an action to enjoin the removal of a frame building within the fire limits of a city after partial destruction by fire, after a trial on the merits before the court. Affirmed.

Brooks & Bartlett and John H. Pedigo, for appellant.

Oscar Cain and J. C. Hurspool, for respondent.

FULLERTON, J.—The city of Walla Walla is a municipal corporation operating under a special charter enacted by the legislative assembly of the Territory of Washington. Section 4 of the charter gives the city power to make regulations for prevention of accidents by fire, and “on petition of the owners of one-half of the ground included within any prescribed limits within the city, to prohibit the erection within such limits of any building or any addition to any building, unless the outer walls thereof be made of brick and mortar and iron, or stone and mortar, and to provide for the removal of any building, or any addition erected contrary to such prohibition.” Pursuant to this provision of its charter, the city enacted an ordinance creating fire limits, within which it made it unlawful to erect any building other than those defined in the city charter, or to repair or rebuild, without the consent of the city council, any wooden building within the fire limits that should be damaged by fire to an extent equaling 80 per centum of its value.

The appellant owned a framed structure erected upon a concrete basement within the fire limits, which was destroyed by fire to an extent greater than 80 per centum of the value of the building if the concrete basement is not included in the estimate of value, but less than 80 per centum of its value if the concrete basement is included in such estimate. The city authorities, claiming that the building was destroyed to such an extent as to prevent the owner from rebuilding,

Apr. 1909]

Opinion Per FULLERTON, J.

threatened to remove the portion of the structure remaining, when this action was begun to enjoin them from so doing. At the trial the court held with the city, and dismissed the action. The owner appeals.

The appellant attacks the validity of the ordinance. He complains that it was not shown that the ordinance was preceded by the preliminary petition prescribed by the city charter. But as we read the record, there was no issue on this question. The city in its answer pleaded that the ordinance was duly passed, while the denial in the reply merely questions the power of the city to pass the ordinance, not that the preliminary steps were not properly taken. This form of denial does not put in issue the regularity of the proceedings leading up to the passage of the ordinance, and the city was not called upon to prove them.

It is next insisted that the ordinance is arbitrary and confiscatory in that it attempts to confer upon the city power to destroy property of the citizen without first ascertaining by a judicial proceeding whether the property is within the terms of the ordinance, or subject to destruction thereunder. But to prevent the erection of a building within a prohibited area, or take down a building erected therein in violation of an ordinance prohibiting its erection, is not a condemnation of the property to a public use, but is merely the exercise of the police power of the state, and may be done by the city without a resort to judicial proceedings. *Eichenlaub v. St. Joseph*, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590; *McKibbin v. Fort Smith*, 35 Ark. 352; *Klingler v. Bickel*, 117 Pa. St. 326, 11 Atl. 555; *Hine v. New Haven*, 40 Conn. 478; *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830.

Whether the particular ordinance is valid, since it requires the removal of a wooden building only 30 per centum of which is destroyed, is a more serious question. A case in point, supporting the ordinance, is *Ironsides v. Vinita* (Ind. Ter.), 98 S. W. 167. In that case the charter empowered the municipality to make regulations for the purpose of guarding

against accidents by fire, and to prohibit the erection of any building, or any addition to any building, more than ten feet high, unless the outer walls thereof be made of brick or mortar, or of iron or stone and mortar; and to provide for the removal of any building or additions erected to any building contrary to such prohibition. Acting under this charter, the city enacted an ordinance establishing fire limits and making it unlawful to repair or rebuild any wooden building within such fire limits which had been damaged to an extent of 25 per cent of the value thereof, without obtaining permission from the town council. It was held that ample authority was given the city by the charter to enact the ordinance. In our judgment this conclusion is just, when it is remembered that the purpose of a fire limit is to prevent the destruction of human life and property by fire, and we adopt it as a proper construction of the ordinance in question here.

Finally, it is urged that the value of the concrete basement should be taken into consideration in estimating the value of the building and the relative proportion thereof which the fire destroyed. While it is true that the term "building" without other description usually includes the foundation upon which it rests, it is manifest that it was not so intended by this ordinance. The concrete foundation is not in the least objectionable. It complies strictly with the terms of the ordinance. The whole danger lies in the wooden superstructure, and it is this only that must be considered in determining the percentage of destruction.

The judgment will stand affirmed.

CHADWICK, GOSE, CROW, MOUNT, and DUNBAR, JJ., concur.

Apr. 1909]

Statement of Case.

[No. 7651. Decided April 7, 1909.]

H. M. GOULD *et al.*, *Appellants*, v. ANNIE L. AUSTIN,
Respondent.¹

APPEAL—REVIEW—HARMLESS ERROR—NOTICE OF SIGNING JUDGMENT. Failure to give notice of the signing of findings and judgment, after a hearing on proposed findings and the taking of the same under advisement, is error without prejudice, where the party was deprived of no substantial right.

JUDGMENT—CLERK'S MINUTES—CONCLUSIVENESS—SUBSEQUENT ENTRY OF CONFLICTING JUDGMENT. A clerk's entry in the journal that the court ordered the case dismissed on defendant's motion, at the close of plaintiff's case, is not conclusive evidence of the actual judgment, and does not preclude the court from subsequently making findings and entering judgment granting the defendant affirmative relief; and the formal judgment controls the clerk's entry.

JUDGMENT—RECITALS—JUDGMENT ON MERITS—EFFECT—APPEAL—HARMLESS ERROR. In an action to quiet title a recital in a judgment for the defendant, that "plaintiffs were duly sworn and offered evidence in support of their case" whereupon they rested and the court granted defendant's motion for judgment, authorizes a judgment on the merits, barring the plaintiff from the prosecution of any further action; hence it is harmless error for the court to include in the judgment a provision quieting defendant's title.

APPEAL—REVIEW—DEFECTIVE FINDINGS—EFFECT—RECORD—EVIDENCE—PRESUMPTION IN SUPPORT OF JUDGMENT. In an equitable action, incomplete or defective findings are not ground for reversal, where the evidence is not brought up, as it will be presumed that the evidence supports the judgment.

Appeal from a judgment of the superior court, for King county, Morris, J., entered February 29, 1908, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

H. H. Eaton (Sullivan & Stevens, of counsel), for appellants.

McCafferty & Godfrey and Stephen V. Carey, for respondent.

¹Reported in 100 Pac. 1029.

FULLERTON, J.—The appellants sued the respondent to quiet title to real property. Issue was taken on the complaint, and a trial was had on January 8, 1908, the minutes of which the clerk recorded in his journal in the following language:

“This cause comes on regularly for hearing this day, Plaintiff appearing in person and by counsel H. H. Eaton, F. P. Christenson and A. C. McDonald, Esqs.

“Defendant appearing in person and by counsel Messrs. McCafferty & Godfrey and S. V. Carey, Esq.

“Defendant’s motion for judgment on pleadings is denied. Exception allowed.

“Plaintiffs’ exhibits ‘A’ and ‘B’, Two deeds, and plaintiffs’ exhibits ‘C’, Files in Cause No. 30641, are filed.

“H. H. Eaton and F. P. Christenson are sworn and examined on behalf of the plaintiffs. Plaintiffs rest.

“Defendant’s motion for judgment of dismissal is granted. “Exception allowed to plaintiff.”

On February 29, 1908, the court made and caused to be filed findings of fact and conclusions of law in which it was found and concluded that the appellants had no title to the property in virtue of the deed under which they claimed, but that such deed was a cloud upon the respondent’s title, and that respondent was entitled to a judgment quieting her title to the property against the claim of the appellants, and to an order cancelling of record the deed under which they claimed title. A judgment was entered on the same day in accordance with the findings and conclusions so made. On March 10, thereafter, the appellants moved to set aside and vacate the findings and judgment so entered, on the grounds that the same were contrary to the court’s ruling and decision at the conclusion of the trial of the cause; that the findings and judgment were procured to be signed without notice to them, and that the findings and judgment were made and entered through inadvertence on the part of the court. The motion to vacate was denied, and this appeal was taken therefrom, as well as from the judgment entered.

Apr. 1909]

Opinion Per FULLERTON, J.

The statement of facts contains the proceedings occurring subsequent to the judgment only. These do not support in their entirety the facts assumed to exist by the recitals in the motion. It does not appear that the findings and judgment were made without notice to the appellants. On the contrary, proposed findings were served upon them, and the question of their propriety and sufficiency was the subject of a hearing at which the appellants appeared and contested the right of the court to make findings at all, as well as the propriety of making the particular findings submitted. At the conclusion of this hearing, the question was taken under advisement by the court, and the findings and judgment proposed were subsequently signed and filed, with certain amendments. Notice of the time when this was done was not given the appellants. But this fact does not require a vacation of the findings and judgment. Had the want of notice deprived the appellants of a substantial right which could not be corrected without such vacation, a different question would be presented. But no such condition is involved here. The appellants were not prejudiced by the omission, and error without prejudice does not require reversal.

The principal contention of the appellants is based on the recitals contained in the journal entry above quoted. It is said that this entry furnished indisputable evidence that the court ordered the cause dismissed on motion of the defendant at the time the appellants rested their case in chief, and that the court was thereafter without power to enter any other judgment than a judgment of dismissal; or if power did exist to enter another judgment, that the entry of such a judgment would be at least error requiring reversal on the appeal from the judgment. But we think this is giving too much effect to the journal entry. The rule in this state is that where there is a conflict between the clerk's minute entry of the court's proceedings and the formal written judgment signed by the judge, the latter will control and be

deemed the actual judgment of the court. This was held by us in the case of *State ex rel. Jensen v. Bell*, 34 Wash. 185, 75 Pac. 641, where we prohibited the trial judge from enforcing an order as recorded in the clerk's minutes instead of the order as recorded in the formal written entry signed by him, the orders as recorded being conflicting. The reason for the rule was forcibly stated by Judge Hadley, speaking for the court, in the following language:

"In this instance it appears to the respondent judge that the clerk's minute entry more correctly records his decision than his own signed order, but another time the situation may be reversed. He may then find that the clerk's minutes are inaccurate, and that his own deliberately signed order correctly states his decision. If we should be thus driven from one to the other for evidence as to the actual order of the court, it is evident that frequent confusion might arise. It is therefore manifest that there should be some standard in the record, to which reference may be made as the conclusive evidence of what has been actually decided. We believe, when a written judgment or order has been signed by the court, it should be regarded as such standard. We think it a safe rule to hold that, when the court signs a written order, it shall be considered the evidence of its real and final act touching the subject immediately under consideration."

Applying this rule here, we must hold that the court did not order the action dismissed, as the journal entry recites, but reserved the case for further consideration, and entered its final judgment at a later date.

In the judgment entry it is recited that the "plaintiffs having introduced witnesses who were duly sworn and offered testimony in support of their case and having duly closed their case and rested, the defendant thereupon duly moved the court for judgment for defendant," and the court after hearing counsel and being fully advised orders, adjudges, and decrees, etc. It is argued that this recital shows that all of the testimony introduced was in support of the appellants' case, and in itself precludes the court from entering

Apr. 1909]

Opinion Per FULLERTON, J.

any other judgment than a judgment of dismissal with costs to the respondent, and, hence, in itself shows that the judgment entered was erroneous. But manifestly this recital authorizes the court to enter a judgment against the appellants upon the merits of the action, absolutely barring them from maintaining another action against the respondent for the same cause of action. This the court did do, but added thereto a clause quieting title to the property in dispute in the respondent. But since the judgment on the merits was proper and bars any further right the appellants have in the property, it can make no difference to them, even though the court did add something further for the apparent benefit of the respondent. In other words, that part of the judgment quieting title in the respondent, if it be erroneous, does not operate to the prejudice of the appellants, and they cannot predicate error upon it.

It is contended finally that the findings of fact do not support the judgment, and that it must be reversed for that reason. That the findings are faulty in the respect contended for we think must be conceded, but the conclusion drawn therefrom does not necessarily follow. A judgment entered without any findings at all is valid in a case of equitable cognizance, and it cannot be that one entered on defective or insufficient findings is in a worse position. Where the findings are complete and it appears therefrom that another and different judgment from that entered by the court must be entered to comply therewith, the court will, on appeal, where the findings alone are brought up, direct the judgment to be corrected so as to correspond with the findings, but it does not follow that the court must reverse and remand a cause merely because the findings are defective. In cases where the findings are merely defective it will be presumed that the evidence supports the judgment, and if this presumption is to be overcome, the evidence as well as the defective finding must be brought to this court. *Enos v. Wilcox*, 3 Wash. 44, 28 Pac. 364; *State ex rel. Orr v. Fawcett*, 17 Wash. 188, 49

Pac. 346; *Gay v. Havermale*, 30 Wash. 622, 71 Pac. 190.

The judgment is affirmed.

RUDKIN, C. J., CHADWICK, GOSE, CROW, MOUNT, and DUNBAR, JJ., concur.

[No. 7783. Decided April 7, 1909.]

JOHN K. FISCHER, *Appellant*, v. COLUMBIA & PUGET SOUND RAILROAD COMPANY, *Respondent*.¹

CARRIERS—OF PASSENGERS—PERSONS RIDING ON ENGINE—AUTHORITY OF ENGINEER—CONTRIBUTORY NEGLIGENCE. Where a freight train is in charge of a conductor, and has in it a caboose for the carriage of passengers, one who rides upon the engine at the invitation of the engineer and without the knowledge of the conductor is guilty of contributory negligence and is not a passenger, although he rode there for fear he would not have time to board the caboose before the train started; as it is not within the scope of the engineer's authority to consent to carry passengers on the engine, and a man of mature years must take notice of that fact and of the impropriety of riding there.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered April 23, 1908, in favor of the defendant, after a trial on the merits before a jury, dismissing at the close of plaintiff's case an action for personal injuries sustained by a passenger riding on a freight engine. Affirmed.

Elias A. Wright and *F. C. Kapp*, for appellant.

Farrell, Kane & Stratton, for respondent.

GOSE, J.—The plaintiff brought this action to recover damages for personal injuries. There was a judgment for the defendant, from which the plaintiff has appealed. The complaint states that, on the 19th day of August, 1907, the respondent, a railway corporation, was a common carrier of freight and passengers for hire; that on such day it ac-

¹Reported in 100 Pac. 1005.

Apr. 1909]

Opinion Per Gose, J.

cepted the appellant as a passenger, and agreed to carry him from Taylor Station to a station called "Camp No. 3;" that while carrying him, the respondent carelessly and negligently permitted the train on which the appellant was riding to get beyond control and run away; that as a result of such negligence the train left the track, was wrecked, and the appellant was permanently injured. The answer admitted that the respondent was a railway corporation, and that it operated its line of road between the stations mentioned; but denied each of the other averments in the complaint. The respondent pleaded affirmatively, that the appellant's injury was due to his own negligence; that he assumed the risk; and that he was a trespasser upon the property of the respondent at the time he received his injury. The reply joined issue upon each of these affirmative averments. At the conclusion of the appellant's testimony, upon the motion of the respondent, the court entered a judgment dismissing the cause.

We gather from the evidence the following facts: At the time the appellant received the injury for which he seeks to recover judgment, the respondent was a railway corporation carrying freight and passengers for hire; that prior to June, 1907, it had operated one train daily between Taylor Station and Camp No. 3, upon which it had carried both freight and passengers; that at about this time, it established a daily passenger train between these points and also operated a daily freight train between the same points; that the freight train had no schedule time; that it would leave Taylor Station daily, going north, between two and four o'clock in the afternoon; that Camp No. 3 is about four miles northerly from Taylor Station; that there was no depot, waiting room, or platform at Taylor Station; that the appellant at the time of the injury was foreman of construction for Denny-Renton Clay & Coal Company; that on the day of the injury he was taking a car and a crew of men to Camp No. 3, for the purpose of having the car loaded and returned to

Taylor Station; that there was a caboose on the freight train between such points on said day; that between two and four o'clock he directed his men to get aboard the train; that he inquired of the conductor how soon he would leave the station, and was informed that the train would start in about ten minutes; that he went some distance from the train to attend to some business for his employer, returning in about five minutes; that the train was then ready to start; that he feared that, owing to the length of the train and the unevenness of the ground, he would not be able to reach the caboose in time to take passage; that the engineer told him to get on the engine, and he did so; that the crew, owing to defective brakes, lost control of the train; that when it was near Camp No. 3, where the switch had been left open by the respondent, the train was running at a high rate of speed; that the fireman jumped and told him to jump; that the engineer told him to jump, and he did so, and received the injury complained of. There is no evidence that the conductor knew that he was riding upon the engine, nor is there any evidence tending to show that any one in the caboose was injured. There is evidence that people were in the habit of riding on the freight train which, as we have said, carried a caboose. The appellant testified that, "I do not remember of seeing anybody ride on the engine."

The appellant urges two propositions: (1) That it is not negligence *per se* to ride on a freight train which is in the habit of carrying passengers; (2) that the fact that he was riding on the engine does not preclude a recovery. The decisions of this and other courts as to whether it is negligence *per se* to board or alight from a moving train at the instance of the conductor, we do not regard as applicable to the facts in the case at bar; nor do we regard as applicable the cases touching the status of a person riding on the platform of a car, or riding on a freight train which customarily carries passengers. In support of the second proposition, the appellant has cited three cases where the injury re-

Apr. 1909]

Opinion Per Gose, J.

sulted to a party who was riding on an engine, in which the question of negligence was submitted to the jury: *Philadelphia etc. R. Co. v. Derby*, 14 How. 468, 14 L. Ed. 502; *Waterbury v. New York etc. R. Co.*, 17 Fed. 671; *Lake Shore etc. R. Co. v. Brown*, 123 Ill. 162, 14 N. E. 197, 5 Am. St. 510.

In *Philadelphia v. Derby*, *supra*, the plaintiff, a president of one railroad company, was riding upon an engine upon the invitation of the president of the defendant's road, at the time of the injury. In *Waterbury v. New York etc. R. Co.*, *supra*, the plaintiff, a stock drover, was riding upon the engine when he received the injury. It appeared that on various prior occasions he and other drovers had been permitted by employees of the defendant to accompany the cattle by the same train, sometimes on the cars of the cattle train, at other times on the engine. The drovers were required to look after their own cattle. At times the trains were delayed and the cattle required attention, and the railroad company did not look after them at such time. The grounds upon which the court submitted the case to the jury are well stated in the following language:

"Upon the occasion in question the plaintiff and another drover got upon the engine, there being none but box cars on the train. The engineer inquired if they had cattle on the train, and being informed that such was the fact, made no objection to their riding upon the engine. . . . It should have been left to the jury to determine as a question of fact whether the defendant had by its conduct held out its employees to the plaintiff as authorized under the circumstances to consent to his being carried on the train with his cattle."

But the court states the general rule as follows:

"Undoubtedly the presumption of law is that persons riding upon a train of a railroad carrier, which are palpably not designed for the transportation of persons, are not lawfully there. And if they are permitted to be there by the consent of the carrier's employees, the presumption is against the

authority of the employees to bind the carriers by such consent."

In *Lake Shore etc. R. Co. v. Brown, supra*, the deceased was, and for several years had been, a shipper of stock to the Union Stock Yards, Chicago. The defendant's yards were about three-fourths of a mile from the stock yards, and its habit was to attach cars containing stock to a switch engine and then convey them from the company's yards to the stock yards. On the day of the injury, the caboose in which the deceased had been riding was detached from the train, and the switch engine attached thereto. The engineer told the deceased to get on the engine. He did so, and was killed. It was the duty of the company to carry the deceased and his stock to the stock yards, and no other mode of transportation was provided for the deceased. In *Pool v. Chicago etc. R. Co.*, 53 Wis. 657, 11 N. W. 15, an authority also relied upon by the appellant, the plaintiff, a detective, was injured while being carried on a handcar by the defendant, and at its request, to engage in its service. At page 659, it is said:

"That, upon his going to the depot at Portage City the means of conveyance provided by the company, or its agents, was a hand-car upon which he was directed to ride. This shows that this mode of transit was authorized by the company, and the company was certainly under obligation to use reasonable care to insure his safe carriage in that manner."

In the instant case the appellant had the option of two modes of riding; (1) upon the passenger train which left Taylor Station daily going north, passing Camp No. 3, and leaving Taylor Station about noon; (2) the caboose on the freight train. The appellant, as we have stated, was foreman of a construction company. He was forty-one years of age, receiving a salary of \$140 per month. We must, therefore, assume that he was a man of at least ordinary intelligence. The structure and use of an engine are such as to

Apr. 1909]

Opinion Per GOSE, J.

give notice to all persons of ordinary intelligence that it is not designed for the carrying of passengers. The conductor is the agent of the common carrier, who has charge of the train and the passengers. The engine is designed and used for the accommodation of the engineer and the fireman in the discharge of their duties. Common carriers of passengers are held to the exercise of the highest degree of care. This is necessary for the protection of human life. This being true, public policy forbids that they should be hampered in the performance of this duty by carrying passengers on the engine or tender. The engine is a place of danger, and every person of ordinary intelligence will be required to take notice of this fact. The train upon which the appellant desired to be carried had a caboose. If he wanted to become a passenger it was his duty to get aboard the train before it started, and take a place designed or used for the accommodation of passengers. He approached the conductor and said to him that he wanted to go to Camp No. 3, and asked him when he would start. He testified, that the train had no regular hour for leaving Taylor Station; that it left between two and four o'clock each afternoon. He knew when the conductor told him that it would start in about ten minutes that it was only an estimate of time. It was his duty to get on the train, and not to undertake to delay it by matters of no concern to respondent. If the train left him without fault upon his part he had his action for damages.

In *Chicago etc. R. Co. v. Michie*, 83 Ill. 427, speaking on this subject, it is said:

"The permission of the engine driver, if given, was not the permission of the company, as he had no power to give it. Had the conductor of the train given the permission, or, knowing the deceased was upon the engine, suffered him there to remain, it might be considered the act of the company, as the conductor has control of the entire train, and his act is rightfully regarded as the act of the company, and the authorities cited by the appellee on this point might be applicable. The driver of the engine occupies a different

and very subordinate position. He has no right to say who shall be upon the train, or take cognizance of such as may be upon it. He is to look to his engine, and keep it in order, and permit no one to ride upon it without the permission of his superior."

In *Atchison etc. R. Co. v. Johnson*, 3 Okl. 41, 41 Pac. 641, the plaintiff had paid a brakeman the sum of one dollar for the privilege of riding in a box car from the village of Purcell to the town of Guthrie, and while so riding he was injured. At pages 645-6, it is said:

"There are certain facts in railroad passenger and freight traffic of which the public is required to take notice. One is that a passenger train is for the purpose of carrying passengers. Another is that a freight train is for the purpose of carrying freight. One proposing to be carried as a passenger upon a freight train must advise himself upon what terms the company will contract to carry him as a passenger, and with whom he may make the contract. The courts will require that the traveling public shall take notice that freight cars are not intended for the carriage of passengers; that, when passengers are accepted upon freight trains, the caboose attached to the train is the car in which passengers must place themselves, unless otherwise directed by a person having charge of the train; that the railroad company places a conductor in charge of each train, who has charge of its management in all respects, and with whom persons proposing to be carried as passengers must contract, and under whose direction they must act, subject to the rules of the company; that, in order to the manipulation of the mechanical movement of the train, it is necessary that the railroad company should employ an engineer, whose duty is to manage the engine, a fireman, whose duty it is to attend to the fires, and a brakeman, whose employment and duty it is to attend to the brakes upon the train. A person proposing to become a passenger must deal with the conductor who has charge of the train, and not with the subordinate employees of the train. It is not within the scope or authority of the engineer, fireman, or brakeman to collect fare or bind the company, and the defendant in error had no right to suppose that the brakeman, Harry Hill, could bind the company by agreement by

Apr. 1909]

Opinion Per Gose, J.

which the defendant in error undertook to make the payment which he did. Upon his having undertaken to procure transportation upon the freight train of the plaintiff in error as a passenger, it was the duty of the defendant in error to have informed himself of the rules and regulations of freight trains, intended primarily for the carriage of freight, and to have informed himself by applying to the conductor who had charge of the train, and so ascertain upon what conditions he would be accepted and permitted to ride upon the train as a passenger. He failed to do this, and failed to become a passenger entitled to that high degree of care which railroad companies are held to owe to those who are accepted as, and whom it agrees to carry as, passengers. The defendant in error, in undertaking to negotiate with the brakeman, failed to put himself in charge of the carrier so as to raise the relation of carrier and passenger. . . . We shall accordingly hold that the defendant in error was, by the act of going into the box car on the freight train of the defendant, at the invitation of the brakeman, and without the knowledge of the conductor, guilty of such contributory negligence as would preclude his recovery in this case,"

In *Flower v. Pennsylvania R. Co.*, 69 Pa. St. 210, 8 Am. Rep. 251, the fireman asked a boy ten years of age to put in the hose on the tender and turn on the water. The boy, in compliance with this request, climbed up the side of the tender and, as he did so, some detached cars struck the car behind it. The boy was killed. The court, in holding the company exempt from liability, said:

"This seems to be equally plain, without resorting to evidence given, that engineers are not permitted to receive any one on the engine, but the conductor and the foreman or superintendent; that it is the duty of the fireman to supply the engine with water; that he has no power to invite others to do it, and can leave his post only on a necessity. The business of an engineer requires skill and constant attention and watchfulness, and that of a fireman requires some skill and much attention. They are in charge of a machine of vast power and much capacity for mischief. . . . It may excite our sympathy, but cannot create rights or duties which have no other foundation."

In *Snyder v. Hannibal etc. R. Co.*, 60 Mo. 418, servants of the company had been in the habit of permitting the injured boy and other boys to jump on the train and ride between certain points in the city. The boy was injured in attempting to get on the train. The court said:

"The mere fact that a tortious act is committed by a servant while he is engaged in the performance of the service he has been employed to render cannot make the master liable. Something more is required. It must not only be done while so employed, but it must appertain to the particular duties of that employment."

In *Duff v. Alleghany R. Co.*, 91 Pa. St. 458, 36 Am. Rep. 675, the conductor had permitted the injured boy to ride on the train from day to day, not as a passenger or an employee, but for the purpose of selling newspapers. The court said:

"This is a case of mere trespasser, and the company owed him no duty."

In *Atchison etc. R. Co. v. Lindley*, 42 Kan. 714, 22 Pac. 703, 16 Am. St. 515, 6 L. R. A. 646, a stock drover, at the request of the conductor, got on top of a freight car to give signals, and was injured. The court, in holding that the company had incurred no liability, said:

"He occupied merely the position of a passenger who voluntarily assumed a very dangerous position."

"The plaintiff did not become a passenger or obtain any of a passenger's rights by paying over his money at the demand of the brakeman, for it is not within the scope of authority, apparent or real of the latter, to collect fare. . . . From the undisputed evidence it is clear that the only duty owing to the plaintiff by defendant company was to refrain from wantonly inflicting an injury upon him." *McNamara v. Great Northern R. Co.*, 61 Minn. 296, 63 N. W. 726-7.

In the last case cited, the injured party had paid a brakeman a sum of money for the privilege of riding in a box-car.

Apr. 1909]

Opinion Per GOSE, J.

"But there are certain portions of every railroad train which are so obviously dangerous for a passenger to occupy and so plainly not designed for his reception that his presence there will constitute negligence as a matter of law, and preclude him from claiming damages for injuries received while in such position. A passenger who voluntarily and unnecessarily rides upon the engine or the tender or upon the pilot or bumper of the locomotive or upon the top of the car or upon the platform, cannot be said to be in the exercise of that caution and discretion which the law requires of all persons who are of full age, of sound mind, and of ordinary intelligence." *Little Rock etc. R. Co. v. Miles* (Ark.), 13 Am. & Eng. R. R. Cases (Old Series) pp. 10, 23-4.

In *Railroad Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506, the court, at pages 442-3, say:

"The plaintiff had been warned against riding on the pilot, and forbidden to do so. It was next to the cowcatcher, and obviously a place of peril, especially in case of collision. There was room for him in the box car. He should have taken his place there. He could have gone into the box car in as little if not in less time than it took him to climb to the pilot. The knowledge, assent, or direction of the company's agent as to what he did is immaterial. If told to get on anywhere, that the train was late, and that he must hurry, this was no justification for taking such a risk. As well might he have obeyed the suggestion to ride on the cowcatcher, or put himself on the track before the advancing wheels of the locomotive."

We conclude, therefore, that the engineer, in inviting the appellant to get onto the engine, did not act within the real or apparent scope of his authority, that the appellant was required to take notice of this fact, that the appellant was not a passenger, that the company owed him no affirmative duty, and that he cannot recover. The judgment will, therefore, be affirmed.

MOUNT, CROW, DUNBAR, CHADWICK, and FULLERTON, JJ.,
concur.

PARKER and MORRIS, JJ., took no part.

[No. 7719. Decided April 8, 1909.]

**HIRAM H. RUST *et al.*, Respondents, v. HIRAM B. KENNEDY
et al., Appellants.¹**

TAXATION—FORECLOSURE—PROCESS—PERSONAL SERVICE OF SUMMONS—WHEN NECESSARY—VACATION OF VOID JUDGMENT. A tax foreclosure judgment, secured by a private individual by publication of summons without personal service of the summons on the owner to whom the land was assessed, and who lived on the premises, is void, and is properly vacated in an action to set it aside.

Appeal from a judgment of the superior court for King county, Morris, J., entered February 10, 1908, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to vacate a tax judgment. Affirmed.

A. C. McDonald, for appellants.

Walter S. Fulton, for respondents.

MOUNT, J.—The plaintiffs brought this action in the court below to set aside a tax judgment and deed issued thereunder, upon the ground that the plaintiffs were not served personally with summons in the tax foreclosure proceedings upon which the deed was based. A judgment was entered in favor of the plaintiffs, and the defendants have appealed.

The respondents were owners of the land in question. They neglected to pay the taxes thereon, and a certificate of delinquency was issued to one A. A. Booth, who brought an action to foreclose the certificate. The certificate showed that the land was assessed to the respondent Hiram H. Rust. The action was brought against him, and service was had by publication of summons. Mr. Rust lived in King county, and maintained his residence upon the land. He lived part of the year upon the land and part at the town of Enumclaw, within about three miles of the land in question. His residence

¹Reported in 100 Pac. 998.

Apr. 1909]

Opinion Per MOUNT, J.

was well known in the vicinity. No personal service was made upon him, and he knew nothing of the foreclosure proceedings until after judgment and deed. He thereupon brought this action to set aside the tax judgment upon the ground above stated. He tendered the amount of taxes due, together with penalty, interest, and costs. The only question in the case is whether the court erred in vacating the judgment and deed because the respondent Rust was not personally served with summons in the tax foreclosure proceedings.

Appellants rely upon the following cases: *Washington Timber & Loan Co. v. Smith*, 34 Wash. 625, 76 Pac. 267; *Allen v. Peterson*, 38 Wash. 599, 80 Pac. 849; *Rowland v. Eskeland*, 40 Wash. 253, 82 Pac. 599. The first of these cases was a foreclosure by the county, and it was there held that service might be made by publication, and that the owner was bound to take notice of the action. *Allen v. Peterson*, *supra*, was an action by a private person to foreclose a certificate. The person to whom the property was assessed and another not mentioned in the certificates were made parties. The service was had by publication. The party to whom the land was assessed was dead. We there held, at page 604, that, when "the legislature provided that the lien for taxes might be foreclosed in the courts against the person to whom the land was assessed, whether that person was or was not the owner of the property, it acted within its power and the person foreclosing acquires a legal title by proceeding as the statute directs." The party to whom the land was assessed was the necessary party. Service could not be made upon him, but could be made *in rem* only by publication, and such service was sufficient. In *Rowland v. Eskeland*, where the tax title was based upon a foreclosure by the county, we held that notice might be given exclusively by publication as the statute directs, and that the statute only requires notice to be given to the owner named in the delinquent tax certificate. While it was decided in these cases and many

others which are therein referred to that these tax foreclosures are proceedings *in rem*, and that it was within the power of the legislature to prescribe the kind of service or notice to be given, it was not held that in a foreclosure by a private party, as this one was, the notice or service required by statute need not be given. The rule is that the statute must be strictly followed.

The case of *McManus v. Morgan*, 38 Wash. 528, 80 Pac. 786, is directly in point upon the question presented in this record. In construing the statute requiring the notice to be given to the owner of the property described in the tax certificate where the action is brought by a private party, we said:

"We think the language here used was intended to convey the idea that the notice was to be given under the rule for serving civil process—that is, it was to be served personally, if personal service could be made, and, if personal service could not be made, then the service might be made by publication. But before the substituted service could take the place of personal service under the statute, the necessary facts, as required, should affirmatively appear."

In this case it affirmatively appears that actual notice could and should have been given, because the owner to whom the land was assessed was an actual resident thereon and of the county. The case was, therefore, not one for a substituted service in the foreclosure by a private party. In *Pyatt v. Hegquist*, 45 Wash. 504, 699, 88 Pac. 933, 935, we held that a judgment foreclosing a tax certificate, obtained by a private party upon publication of summons, was properly set aside where it appeared that the owner lived upon the land and could readily have been found. The rule as applied in these two cases last cited must control in this case. The tax judgment and deed were, therefore, properly vacated, and the judgment must be affirmed.

CROW, PARKER, DUNBAR, CHADWICK, FULLERTON, and GOSE, JJ., concur.

MORRIS, J., took no part.

Apr. 1909]

Opinion Per CROW, J.

[No. 7349. Decided April 8, 1909.]

N. C. WILEY *et al.*, Respondents, v. VICTOR VERHAEST *et al.*,
Appellants.¹

EXECUTORS AND ADMINISTRATORS—HUSBAND AND WIFE—COMMUNITY PROPERTY—ADMINISTRATION—JURISDICTION TO ADMINISTER ONE-HALF—COLLATERAL ATTACK. Upon the death of a wife, the court has jurisdiction to administer upon her undivided one-half interest in community real property, no objection being made, although the proceeding may be irregular and the proper course would have been to administer upon the entire community estate; and a sale of such half interest to pay community debts cannot be collaterally attacked for want of jurisdiction (CHADWICK and PARKER, JJ., dissenting).

VENDOR AND PURCHASERS—TITLE OF VENDOR—OBJECTIONS BY VENDOR—ESTOPPEL TO URGE DEFECTS—ACTION PERFECTING VENDOR'S TITLE—SPECIFIC PERFORMANCE. Where purchasers of real estate had refused to accept a title because of defects in an administrator's sale of the interests of minor heirs, yet insisted on holding possession and that the vendor perfect his title, they cannot, in an action brought by the vendor against all interested parties to quiet and assure his title and for specific performance, urge defects in the administrator's sale which are not urged by the heirs after they were duly made parties to the action, and who failed to except to, and are concluded by, findings in favor of the vendor, quieting his title; since the judgment declaring the vendor's title perfect concludes all the parties in interest.

Appeal from a judgment of the superior court for King county, Morris, J., entered December 9, 1907, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action for the specific performance of a contract to sell land. Affirmed.

Frank S. Griffith, for appellants.

Harold Preston, for respondents.

CROW, J.—This action was commenced by N. C. Wiley and Sallie F. Wiley, his wife, against Victor Verhaest, his wife, H. A. Harris, H. A. Harris as administrator of the

¹Reported in 100 Pac. 1008.

estate of K. B. Harris, deceased, Zera Harris, a minor, and Muryl Harris, a minor, to quiet title and to enforce the specific performance of a contract to sell real estate. On July 13, 1907, after the administration proceedings hereinafter mentioned, plaintiffs entered into a written contract to sell to Victor Verhaest lot 5, in block 51, T. Hanford's addition to the city of Seattle, for \$2,475. The defendant Victor Verhaest paid \$50 cash thereon, and with the consent of plaintiffs entered into immediate possession. Plaintiffs had acquired title to one undivided one-half of the lot from the defendant H. A. Harris, individually, and the other undivided one-half from the defendant H. A. Harris as administrator of the estate of K. B. Harris, deceased. When the plaintiffs tendered a deed to the defendant Victor Verhaest, he refused the same, claiming that the title was defective, but retained possession, and refused to accept a return of the \$50 which he had theretofore paid. Thereupon the plaintiffs commenced this action, and in substance alleged, that on September 26, 1906, the defendant H. A. Harris and one K. B. Harris were husband and wife and owned the real estate as their community property; that on said date K. B. Harris died intestate, leaving her husband, the defendant H. A. Harris, and two minor children, the defendants Zera and Muryl Harris, as her only heirs at law; that on September 29, 1906, H. A. Harris was appointed and qualified as administrator of the estate of K. B. Harris, deceased; that he filed an inventory in which he included only the wife's undivided half of the lot above described; that he made application to sell the wife's undivided half of the lot, to pay her half of community debts and the costs of administration; that such proceedings were had that under an order of court he sold the wife's undivided half to plaintiff N. C. Wiley; that the sale was confirmed, and an administrator's deed was executed and delivered; that all the proceedings in the matter of the estate pertaining to the sale were regular and in accordance with the statute; that the plaintiff N. C. Wiley

Apr. 1909]

Opinion Per Crow, J.

purchased from the defendant H. A. Harris the other undivided half of the lot; that thereafter plaintiffs entered into a contract whereby they agreed to sell the entire lot to the defendant Victor Verhaest, who made a partial payment thereon, and with plaintiffs' consent entered into immediate possession; that plaintiffs have tendered a conveyance of the lot to defendant Victor Verhaest; and that he has refused to complete the purchase, to receive a return of his partial payment, or to surrender possession, basing such refusal upon the claim that there is some irregularity in the probate proceedings under which plaintiffs acquired a portion of their title.

By their prayer the plaintiffs, in substance, demand that each and all of the defendants be required to set forth any claim they may have in or to the lot; that the court ascertain and adjudge the title; that if the plaintiffs hold title, a decree for specific performance be entered against the defendants Verhaest and wife, and that they be required to pay the agreed purchase price; that if, on the other hand, the judgment of the court be that the plaintiffs do not have title, a decree be entered setting aside the probate sale, and directing the administrator to refund the sum of \$875 paid by plaintiffs as a consideration therefor.

The defendants Verhaest and wife by their answer interposed certain denials, admitted their contract to purchase; alleged they were to make payment when a merchantable title was given, but that no such title had been tendered; admitted that they had made a partial payment and entered into possession, and admitted that they had refused to complete the purchase, but alleged that they did so by reason of the defective title. For affirmative defense they further alleged, that the plaintiffs Wiley and wife had agreed to give them a good record and merchantable title, and to furnish an abstract showing the same; that they had furnished an abstract showing the title to be fatally defective, and that they had refused to correct the title, or make the same mer-

chantable. By their prayer they demand that plaintiffs be required to give them a good, merchantable title, and that in the event of their failure so to do, they be ordered to refund the partial payment made. H. A. Harris, personally and as administrator, and the minor defendants, Zera and Muryl Harris, by their guardian *ad litem*, filed answers the allegations of which need not be stated.

The trial court made findings of fact, in substance, as follows: That on September 26, 1906, H. A. Harris and K. B. Harris, husband and wife, owned the lot as their community property; that on said date there existed a verbal contract between them and the plaintiff N. C. Wiley for the sale of said lot to plaintiffs, for \$1,400; that on September 26, 1906, K. B. Harris died intestate leaving surviving her H. A. Harris, her husband, and two minor children, Zera and Muryl Harris, as her only heirs at law; that on September 29, 1906, H. A. Harris made application to be appointed administrator of her estate; that thereupon, the court having jurisdiction of the subject-matter, such proceedings were had that he was duly appointed and qualified; that he filed his inventory, including therein the wife's half only of the lot above described; that he made application for an order to sell the wife's half of the lot, to pay her half of the community debts; that his application complied with the statutory requirements; that upon such application being presented, the court made its regular order fixing the time and place of hearing, directing all persons interested to show cause why the application should not be granted; that said order to show cause was published for four successive weeks in a newspaper designated by the court; that on the day of hearing fixed in the order, and before proceeding to otherwise act upon the petition, the court regularly appointed a guardian *ad litem* to represent the minor defendants; that no objection to the granting of the application was made; that the court finding the allegations of the application and petition to be true, made and entered its order directing the

Apr. 1909]

Opinion Per CROW, J.

sale of the wife's undivided half of the lot; that thereupon the administrator, after due publication, sold the same to N. C. Wiley for \$875; that the administrator made return of the sale; that the court (the minors then and there appearing by their guardian *ad litem*) regularly made its order confirming the sale, and directing the administrator to convey the wife's undivided half of the lot to N. C. Wiley; that the plaintiff N. C. Wiley paid the purchase price; that on the 18th day of April, 1907, the administrator made the conveyance; that all such proceedings were regular and in accordance with the statute; that thereafter the plaintiff N. C. Wiley purchased from the defendant H. A. Harris his undivided half of the lot, receiving a conveyance therefor; that out of the proceeds of the administrator's sale the administrator paid the decedent's one-half of the community debts; that out of his own funds he paid the other half; that the time for the presentation of claims against the estate has expired; that all debts of the estate have been paid; that thereafter the plaintiffs entered into a contract to sell the entire lot to the defendant Victor Verhaest; that he agreed to purchase the same for \$2,475, then making a partial payment of \$50; that with plaintiffs' consent he took immediate possession; that his time for final payment expired on August 13, 1907, and that plaintiffs then offered to convey, but that he refused to complete the purchase, to accept a return of his partial payment, or to re-deliver possession, basing such refusal upon some defect in the probate proceedings.

Upon these findings a judgment was entered by which it was decreed that the plaintiffs are the owners in fee simple; that H. A. Harris, H. A. Harris as administrator, Zera Harris, a minor, and Muryl Harris, a minor, have not, nor has any of them, any interest, claim, or title in or to the lot or any part thereof; that the title of the plaintiffs be quieted as against them; that the contract of sale between the plaintiffs and the defendants Victor Verhaest and wife be specifically enforced; that the said defendants forthwith

pay to the plaintiffs \$2,425, with interest, and the costs of this action, and that the plaintiffs forthwith convey the lot to the defendant Victor Verhaest. The defendants Victor Verhaest and wife have appealed. No appeal has been taken by any other party.

The appellants contend, that upon the death of one member of a community, the entire community property is subject to administration; that the superior court has no probate jurisdiction or power to separately administer the undivided one-half of the community property assumed to have belonged to the deceased, and that the plaintiffs therefore acquired no title under the administrator's deed for the deceased wife's undivided one-half of the lot, or under the separate deed afterwards executed and delivered by the husband H. A. Harris for his undivided one-half. In support of their contention that an administration upon an undivided half of the community property only is without jurisdiction and void, they cite: *Ryan v. Ferguson*, 3 Wash. 356, 28 Pac. 910; *Hill v. Young*, 7 Wash. 33, 34 Pac. 144; *In re Hill's Estate*, 6 Wash. 285, 33 Pac. 585; *Sadler v. Nierz*, 5 Wash. 182, 31 Pac. 630, 1030; *In re Cannon's Estate*, 18 Wash. 101, 50 Pac. 1021 and other cases from this court.

There is no question but that, upon the death of one member of the community, the entire community property is subject to administration, and that such complete administration is the proper method of procedure. It is conceded in the case before us that only one-half of the community estate was administered. There was no attempt upon the part of the court to assume jurisdiction for the purpose of administration or probate sale, over any portion of the property other than the deceased wife's undivided half. We fail, however, to discover any sound reason for now holding in this collateral proceeding that the superior court was without jurisdiction to administer upon and sell the undivided half of the estate, although its proceeding must be conceded to have been irregular. There is a marked distinction between judicial pro-

Apr. 1909]

Opinion Per CHOW, J.

ceedings that are irregular or erroneous, and those that have been conducted without jurisdiction. The court would undoubtedly have subjected the entire community estate to its jurisdiction and orders had proper application therefor been made. We have never held the superior court to be without probate jurisdiction to administer upon a deceased spouse's half of community property. Unquestionably it would be the better and certainly the proper practice under our law to subject the entire interest in the community property to administration, but failure to do so, being only an irregularity, does not deprive the court of jurisdiction over that undivided portion upon which administration is actually had. Such an administration being within the jurisdiction of the court cannot, when once completed, be afterwards questioned.

The appellants further contend that the proceedings under which the administrator's sale was had were void for want of proper service of process upon the minor defendants Zera and Muryl Harris; that publication of the show cause order was not made for the entire period of time required by the statute or fixed by the order of court; that no jurisdiction was obtained over the minors by the mere appointment of a guardian *ad litem* who afterwards appeared on their behalf; that the proceeds of the sale of the deceased wife's undivided one-half of the lot, were improperly applied in payment of the entire costs of administration and certain debts, instead of being applied to the payment of only one-half thereof. On all of these questions the trial court found against appellants' contention, and the other defendants have not excepted to or questioned such findings.

Appellants strenuously insist that these findings are not sustained by the preponderance of the evidence, but under the condition of the record now before us, we do not think they are in a position to urge such contention. The respondents properly made H. A. Harris, H. A. Harris as adminis-

trator of the estate of K. B. Harris, deceased, and Zera and Muryl Harris, minors, parties defendant in this action. All of them have been legally and personally served with process herein. A guardian *ad litem* who was regularly appointed for the minor defendants, appeared in this action, answered, and defended on their behalf. The trial court has made findings of fact against each and all of these defendants, and has entered a decree adjudging the plaintiffs' title to be good, not only against H. A. Harris individually and as administrator of his wife's estate, but also as against the minor heirs. None of them have appealed. They have had their day in court. They are the only persons who could possibly question respondents' title. The decree is now binding upon them.

The record further shows that the appellants made a partial payment of purchase money to the respondents; that they took immediate possession of the property; that they refused either to accept a return of the purchase money, or to yield their possession to respondents; that they have continually objected to the title, but at the same time demanded that it be perfected by the respondents, and they have asked in the prayer of their answer that the respondents be required to give them a good and merchantable title. Under these conditions we fail to see how the respondents could proceed otherwise than by the commencement and prosecution of this action. Appellants, by their attitude, have invited the same. The decree of the court from which the other defendants have failed to appeal has completely quieted respondents' title, and placed them in a position to comply with the demand which the appellants, while retaining possession, have constantly made, and still make, by the prayer of their answer herein.

The judgment of the trial court is right, and is therefore affirmed.

RUDKIN, C. J., MOUNT, DUNBAR, and GOSE, JJ., concur.

FULLERTON, J., concurs in the result.

MORRIS, J., took no part.

Apr. 1909] Concurring Opinion Per CHADWICK, J.

CHADWICK, J. (concurring)—I cannot agree with all that is said in the majority opinion of the court. To hold that an administration of an undivided half of community property may be had to the exclusion of the other half is contrary to the settled law and the accepted practice in this state. While the community is perforce dissolved by the death of either spouse, the property remains an entity. The dissolution of the community relationship does not operate to divide or partition the estate. Hence the court cannot take jurisdiction of the undivided half. It must take jurisdiction of the entire interest of the community. If it undertakes to exercise jurisdiction over less than the whole, its act should be held to be void. The reasons for this rule are stated in *Ryan v. Ferguson*, 3 Wash. 356, 28 Pac. 910, and need not be repeated here.

Further, it seems to me that that part of the foregoing decision which assumes to hold that the administration of one-half of the community interest is a mere irregularity is entirely unnecessary to sustain the judgment of the court, and may lead to untold confusion of titles. The trial court was a court of equity exercising general jurisdiction and had all the parties before it. The minors were represented by a guardian *ad litem*. They were bound by the judgment quieting the title in respondent. If our judgment was based upon this ground, however, no costs should be taxed against appellant, for the burden of furnishing a good title was upon respondents, and this they could not do in any event until it had been judicially determined that the heirs of K. B. Harris had waived their interest in the property. If the judgment is to be affirmed it should not be upon the ground that the probate proceeding was sufficient to conclude the interest of the heirs, but because the minor heirs, being in court by their guardian *ad litem*, had allowed their day to pass without asserting their interest.

Another ground upon which the judgment of the trial court can properly be affirmed is that appellants had estopped

themselves to question the title offered, as suggested in the concluding part of the majority opinion.

I concur in the result.

PARKER, J., concurs with CHADWICK, J.

[No. 7950. Decided April 8, 1909.]

THE STATE OF WASHINGTON, *on the Relation of Fred C. Pugh, as Prosecuting Attorney of Spokane County, Relator*, v. THE SUPERIOR COURT FOR SPOKANE COUNTY, *Respondent*.¹

CERTIORARI—PROCEEDINGS—RIGHT TO INSTRUCTIONS—PARTIES INTERESTED—PROSECUTING ATTORNEY—DUTIES BEFORE GRAND JURY. Instructions to a grand jury directing them, in effect, not to permit the prosecuting attorney or his deputy to take a stenographic report of the evidence of the witnesses produced before the grand jury, are not matters reviewable on certiorari at the instance of the prosecuting attorney, or orders directed against him in a proceeding in which he is a party in the sense that he would have any reviewable interest therein (MORRIS, FULLERTON, and DUNBAR, JJ., dissenting).

SAME—INSTRUCTIONS TO GRAND JURY—FORMALITY OF ORDERS REVIEWABLE ON CERTIORARI. Such instructions stating the views of the court as to the grand jury's duty, not in the form of a final order or judgment against the prosecuting attorney, are not so specific or certain as to present any question for review on certiorari (MORRIS, FULLERTON, and DUNBAR, JJ., dissenting).

Application for a writ of certiorari to review orders of the superior court for Spokane county, Huneke, J., entered March 12, 13, and 17, 1909, in instructions to a grand jury. Denied, upon demurrer to the application.

Fred C. Pugh, pro se, contended, *inter alia*, that the grand jury is to follow the rules of the common law, so far as not affected by statute. Bish. Crim. Proc. § 862. The prosecuting attorney has the same powers and duties as at com-

¹Reported in 100 Pac. 978.

Apr. 1909]

Citations of Counsel.

mon law. Bal. Code, §§ 6812, 6813, 6841 (P. C. §§ 2053, 2054, 2094). He can explain both his case and the law to the jurors. *United States v. Cobban*, 127 Fed. 713; *United States v. Nutchell*, 136 Fed. 907. His presence during the voting has been held to be a mere irregularity. *United States v. Cobban*, *supra*; *United States v. Terry*, 39 Fed. 355; 1 Chit. Crim. Law 317. His presence does not violate the rule of secrecy. 10 Ency. Pl. & Pr. 399; *Commonwealth v. Bradney*, 125 Pa. St. 204, 11 Am. St. 886; *State v. Brewster*, 70 Vt. 341, 40 Atl. 1037, 42 L. R. A. 444. He is to control the evidence and advise as to matters of procedure. 1 Whart. Crim. Law, § 495; *United States v. Kilpatrick*, 16 Fed. 766; 17 Am. & Eng. Ency. Law, 1792, 1793. He may take with him into the grand jury room his assistant, deputy clerk or stenographer to assist him. Clarke's Crim. Proc., p. 113; 22 Cyc. p. 1336; 17 Am. & Eng. Ency. Law, 1293; Proffatt, Jury Trial, § 57; Thompson & Merriam, Juries, § 632; *State v. Baker*, 33 W. Va. 319, 10 S. E. 639; *United States v. Reed*, 2 Blatchf. 435, 27 Fed. Cas. 734; *Franklin v. Commonwealth*, 20 Ky. 1137, 48 S. W. 986; *Raymond v. People*, 2 Colo. App. 329, 30 Pac. 504. A stenographer acting under direction of the prosecuting attorney does not violate the secrecy of the jury room. 20 Cyc. 1340-1342; *Sims v. State* (Tex.), 42 S. W. 705; *Courtney v. State*, 5 Ind. App. 356, 32 N. E. 335; *United States v. Simmons*, 46 Fed. 65. The prosecuting attorney may take down the evidence if able. *State v. Bates*, 148 Ind. 610, 48 N. E. 2. The reason for the rule of secrecy does not militate against taking down the evidence for the benefit of the state. *State v. Brewster*, *United States v. Cobban*, and *State v. Bates*, *supra*; *Crocker v. State*, 19 Tenn. 116; Chit. Crim. Law 317; *United States v. Farrington*, 5 Fed. 347; 1 Greenl. Ev. § 252; *State v. Clough*, 49 Me. 576; 1 Arch. Crim. Prac. & Pl. pp. 504-506; Proffatt, Jury Trial, § 48; *In re Atwell*, 140 Fed. 368; *State v. Bowman*, 90 Me. 363, 38 Atl. 331, 60 Am. St. 266; *In re District Attorney*, 7 Fed. Cas. 3025; *Hopper v. State*,

10 Ark. 535. Our statute providing that the grand jury *may* appoint a clerk to keep a minute of the proceedings is merely permissive and not mandatory. Bal. Code, § 6829 (P. C. § 2074); Deady's Laws of Oregon, 1845-1846, pp. 451, 452; *Medbury v. Swan*, 46 N. Y. 200; 5 Words and Phrases, 4420. And Bal. Code, § 6829 (P. C. § 2074), contemplates minutes of the evidence. A writ of certiorari lies to review the charge of the court to the grand jury in such a case as this. *State ex rel. Nolan v. District Court*, 22 Mont. 25, 55 Pac. 916.

P. C. Sullivan, Post, Avery & Higgins, and Graves, Kizer & Graves, for respondent.

PARKER, J.—This is an application by the prosecuting attorney of Spokane county, as relator, for a writ of certiorari, to the end that he may have this court review and correct certain instructions, given by the Honorable William A. Huneke, as Judge of the Superior Court for Spokane county, to the grand jury in attendance upon that court; which instructions, the relator contends, amount to orders of the court against him, and unduly restrict his rights and duties under the law as prosecuting attorney.

Upon filing the application of the relator, the matter was noticed for hearing by order to show cause why the writ should not issue, returnable March 26, 1909, when the respondent demurred to the affidavit and application upon the ground that it "does not state facts sufficient to authorize the issuance of a writ," and upon several other more specifically enumerated grounds, which, however, are included in this general one.

The affidavit of the relator is very voluminous, containing fifty-eight pages of typewritten matter, and made up largely of what is apparently a stenographic report of the court's instructions complained of, its explanations and comments thereon, including conversations and discussions relating thereto between the court, the jurors, and the relator, in open

Apr. 1909]

Opinion Per PARKER, J.

court, on several different days. The substance of the instructions complained of is stated in relator's assignment of error in his brief as follows:

"(1) The court erred in giving to the grand jury, on his own motion, after the jury had been charged, the instruction in the nature of an order in substance that the prosecutor's duties with reference to the grand jury are, to examine witnesses, to give such advice as they may ask, and to prepare all indictments and processes, nothing more. If he should attempt to do other things it would be your duty to direct him to cease, and if he persisted you should report such action to the court.

"(2) The court erred in giving the grand jury, on his own motion and after the jury had been charged that instruction, in the nature of an order, to the effect that if the prosecuting attorney, or his deputy is taking shorthand notes of the testimony, you should at once satisfy yourselves whether he is justified in doing so, that is, whether he is in fact *taking such brief memoranda* of the testimony *as will be reasonably helpful* in the examination of that or other witnesses, or if he is going beyond that, and if he is going beyond that then you should direct him to cease, and if he persists in doing so, then report his action to the court.

"(3) The court erred in instructing the grand jury on his own motion, and after the jury had been charged, as follows: 'A stenographer, not a grand juror, had no right in the jury room.'

"(4) The court erred in instructing the grand jury on his own motion, and after the jury had been charged, 'The only provision in the statute for taking minutes of the testimony is that the grand jury may appoint a clerk from among their number to do this. The statute also contemplates that the grand jury must control such minutes, either until destroyed, or made a matter of public record. It stands to reason that notes of testimony, taken by some one not a member of the grand jury would not be under the control of the grand jury, so that while the law required all testimony in certain cases to be suppressed, still copies of the testimony taken by an *outsider* might be scattered broadcast.'

"(5) The court erred in refusing the request of the grand jury that 'the court allow the prosecuting attorney, or his

deputies to take down such evidence of witnesses as the grand jury deem necessary from time to time.'

"(6) The court erred in instructing the grand jury as follows; in respect to their request that they could not check or prevent the commission of perjury without the right to have the evidence, or parts thereof in shorthand, 'It is not for you to determine whether a witness commits perjury or not.'"

In addition, the application shows that the court indulged in considerable comment upon, and explanation of, the instructions quoted in the assignments of error, leaving some uncertainty as to what extent the grand jury were to allow the taking of testimony of witnesses, in writing or shorthand, by others than themselves or their clerk, leaving that matter somewhat within their discretion.

These instructions, and comments thereon, by the learned judge of the superior court, do not, in our opinion, present matters reviewable in this court at the instance of the prosecuting attorney, they are simply statements to the grand jury of what the judge conceives the law of this state to be touching *their* duties, relating to the actions of the prosecuting attorney and others while in their presence during the examination of witnesses.

The instructions and remarks of the court may to some degree contain the suggestion that the prosecuting attorney might be subject to contempt proceedings in the event he should go beyond the somewhat uncertain bounds indicated by the court to the grand jury as the limits of his rights and duties, but we do not regard that such instructions and comments thereon amount to orders directed against the prosecuting attorney in a proceeding in which he is a party, in the sense that he has a reviewable interest therein, nor are the instructions, together with the court's comments thereon, so certain and specific against the prosecuting attorney that we can indulge the presumption the superior court will unlawfully interfere with his official duties.

Apr. 1909]

Opinion Per PARKER, J.

The only decision called to our attention which we regard as touching the question of the right of the relator to have the action of the learned superior court reviewed, is that of *State ex rel. Nolan v. District Court*, 22 Mont. 25, 55 Pac. 916. In that case, in his charge to the grand jury, the judge of the district court directed and ordered that no person as legal adviser should be consulted by the grand jury other than the county attorney, and that in the examination of witnesses before the grand jury no other person had the legal right and authority to appear. The legislative assembly by resolution having directed the attorney general to assist the county attorney in the investigation of certain bribery charges, then before the grand jury. Upon application to the district court for permission whereby the attorney general might appear before the grand jury, the judge of the district court refused said application, and ordered and adjudged that the attorney general had no authority to appear before the grand jury, or in any way aid or assist in the investigation of the charges being inquired into. We think that case is distinguishable from the one before us. In that case it appears that the attorney general in his own behalf presented his application to the lower court raising the specific question of his right to appear before the grand jury and assist the prosecuting attorney, upon which, the lower court made a specific ruling and final order against him. In the case before us, the views of the learned superior court were only expressed in his instructions to the grand jury, were not in the form of a final order or judgment against the prosecuting attorney, nor were they so specific and certain as to what the prosecuting attorney and his assistants might do in the presence of the grand jury as to enable us to intelligently review them here, even though we were of the opinion they are reviewable. It seems to us that any view this court might express at this time upon the matters presented by this application would be, in effect, anticipating the learned superior court's future action, and giving advice thereon, rather than

revising its action already taken. The function of this court is revisory, not advisory.

A great many decisions from other jurisdictions have been called to our attention by the relator, practically all of which deal with pleas or motions directed against indictments by defendants who conceive themselves to be unlawfully indicted by reason of what occurred in the presence of the grand jury. Even if these decisions should be considered as an aid in testing the correctness of the learned superior court's instructions and remarks to the grand jury as here shown, they do not, in our opinion, throw any light upon the right of the prosecuting attorney to have those instructions and remarks reviewed in this proceeding.

We are of the opinion that the matters here presented are not reviewable at the instance of the prosecuting attorney, and therefore conclude that the writ should be denied.

It is so ordered.

MOUNT, CROW, CHADWICK, and GOSE, JJ., concur.

MORRIS, J. (dissenting).—I dissent. The majority hold that the relator is not a "party beneficially interested," and that the application presents no reviewable question. I cannot concur in either of these holdings. Bal. Code, § 6812 (P. C. § 2058), provides that, "The prosecuting attorney shall attend on the grand jury for the purpose of examining witnesses and giving them such advice as they may ask." Here is a mandatory duty imposed upon the prosecuting attorney, making him an integral part of the machinery of the grand jury. Suppose that the prosecuting attorney refused to "attend on the grand jury." Could not the court by its order compel him to so attend and perform the duties of his office? The prosecuting attorney cannot shirk this duty if he would. He had no discretionary power in the matter. He must obey the plain mandate of the statute, and if he refuse, he subjects himself to the proper order of the court to the same extent as does his refusal to perform any other function

Apr. 1909]

Dissenting Opinion Per MORRIS, J.

of his office. If, then, the court by its rule or instruction, whatever the character of the order may be, restrains the prosecuting attorney from such attendance, or deprives him of any duty imposed upon him, can it be said the prosecuting attorney is not interested? Let us suppose that the court in its instruction to the grand jury should say to them, "No person other than the grand jurors or such witnesses as they may summon shall be permitted to enter the grand jury room;" or, "You will not permit any person not a member of your body to examine any witness that may appear before you." Must the prosecuting attorney supinely bow to such rule and not assert the dignity of his office by seeking a review? Has his office no rights that can be trespassed upon? Is he not "beneficially interested" in obtaining from a court of competent jurisdiction such an interpretation of the statute as will permit him to discharge the duties of his office? Or must he wait until he has been punished as for contempt because he asserts the rights conferred by statute upon his office, before he becomes "beneficially interested?" I think not.

The second holding of the majority, to the effect that the case here presents no reviewable order, is to my mind equally untenable. It is not the character, but the effect, of the rule that must be regarded. If the court should solemnly enter an order in its journal and append its signature thereto, reciting either of the rules I have above suggested, could it be said such a rule would not be reviewable? So far as the grand jury and the prosecuting attorney are concerned, the rule is as binding and as effectual, when given in the form of an instruction, as when formally entered in the record. The fact that it is in the form of an instruction robs it of none of its force or strength, either present or potential. There is no different or less meaning to be attributed to it. Is it any less a formal order of the court in the matter because the court does not formally enter what it has formally announced and ruled?

For these reasons, I am of the opinion that the prosecuting attorney has sufficient interest to become a relator herein, and that the matter suggested presents questions reviewable here. The writ should issue.

FULLERTON and DUNBAR, JJ., concur with MORRIS, J.

[No. 7421. Decided April 8, 1909.]

GENEVIEVE SHERTZER *et al.*, Respondents, v. HILLMAN INVESTMENT COMPANY, Appellant.¹

DEDICATION—PARKS—RIGHTS OF PURCHASERS—INJUNCTION AGAINST REPLAT OR SALE. Purchasers of lots in an addition, in which the plattors have dedicated land for a park thereby inducing the sales and increasing the value of the lots, may maintain an action to enjoin the recording of a second plat whereby the park is subdivided into lots, and from selling the park or interfering with its use by the public.

DEDICATION—PARKS—ACTS CONSTITUTING—CORPORATIONS—ACTS OF OFFICERS—ESTOPPEL. The acts of a corporation in platting an addition of suburban property amount to a dedication of part of the land as a park, where a large copy of the plat used in selling lots was exhibited on the walls of its office maintained in the addition, large signs directed investors to the location of the park, it was featured in advertisements in the newspapers, and improved as a park, and the selling agent and the president of the company owning a majority of the capital stock represented it as a park for public use, and the corporation received the benefit of sales made on such representations.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 18, 1907, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action for an injunction. Affirmed.

Frederick R. Burch, John A. Saboe, and Oliver Hulback (Troy & Falknor, of counsel), for appellant.

Hastings & Stedman, Scott Calhoun, and Howard A. Hanson, for respondents.

¹Reported in 100 Pac. 982.

Apr. 1909]

Opinion Per CROW, J.

Crow, J.—This action was commenced by Genevieve Shertzer and others, to enjoin the Hillman Investment Company, a corporation, from subdividing and selling a tract of land in C. D. Hillman's Atlantic Addition to the city of Seattle. The trial court found that the Hillman Investment Company, owner of a tract of land, did in June, 1905, plat the same into town lots, streets, alleys, and a park; that it caused a map thereof to be made; that the ground was staked to conform thereto; that it platted a portion of the land fronting Lake Washington into a park, showing the same on the plat as a park; that it beautified the park, and arranged it for public use by erecting a wharf, bath houses, and other conveniences thereon; that during the latter part of July, 1905, the Hillman Investment Company by its conduct, declarations, and representations, dedicated the park to the public; that relying upon such conduct, declarations, representations, and dedication, the plaintiffs and many others, did, prior to August 1, 1905, purchase lots in the addition, which was suburban property valuable for residential purposes; that the park made the lots more desirable; that its existence was a material inducement to buyers; that on August 1, 1905, the appellant filed a plat for record which was changed from the one first made and theretofore shown to the respondents; that by such change that portion of the addition appearing on the first plat as a park had been marked and designated as Block 16; that the change had been made without the knowledge or consent of the respondents; that the tract appearing as block 16 of the recorded plat was in fact a public park by virtue of the previous dedication, being the premises so marked on the original plat; that at the time of the commencement of this action the appellant was platting, or about to plat, such public park into lots and blocks for the purpose of selling the same; that the addition when originally platted was outside of the city of Seattle, but that since the commencement of this action it has been annexed to, and included within the city. Upon

these findings, which are sustained by a clear preponderance of the evidence, the trial court held the land in dispute to be a public park, and entered a decree enjoining the Hillman Investment Company from subdividing the same or selling any part thereof. The Hillman Investment Company has appealed.

The appellant contends that the effect of the decree is to compel a conveyance of land by it to the public for use as a park, such order being based upon nothing more than the verbal representations of its agents. It mistakes the theory upon which this action is prosecuted. It is not an action requiring the appellant to specifically perform an oral agreement for the conveyance of land, but is prosecuted upon the theory that the appellant by its acts, declarations, and conduct in making the first plat, and in using it when selling lots, dedicated the land for a public park; that its subsequent acts in changing and recording the plat after respondents' rights had accrued were a fraud upon them and other property owners, and that it should be enjoined and restrained from platting, subdividing, and selling the park or interfering with its use and enjoyment by the public. Since this case was tried in the superior court, the opinion in *Lueders v. Tenino*, 49 Wash. 521, 95 Pac. 1089, was announced, and on the authority of that case we hold that the land in dispute was dedicated as a public park, and that the appellant as an individual owner thereupon ceased to have any rights therein.

Appellant, however, contends that all of the representations as to the existence of the park made prior to the recording of the second plat, of which the respondents complain and upon which they now rely, were oral, that they were made by appellant's president and selling agent, and that no evidence has been produced of any authority in its agents to make such representations, or to show that the appellant had knowledge thereof or ratified the same. Under the evidence this contention cannot be sustained. It appears that, prior to the purchases made by respondents, a large copy of the

Apr. 1909]

Opinion Per CROW, J.

first plat, used in selling lots, was exhibited in a prominent place on the walls of an office which the appellant maintained in the addition; that large signs were placed in the addition directing investors and the public to the location of the park; that the appellant paid for newspaper advertisements in which the park was mentioned as an attractive feature of the addition; that C. D. Hillman, the president of the corporation, and his wife, owned a majority of the capital stock of the appellant corporation; that the representations were made by C. D. Hillman, president, and one Griffin, appellant's selling agent; that the company had to a considerable extent beautified and improved the park for use by the public; that nearly all of the lots in the addition were sold to parties who were at the time informed by appellant's president and selling agent that the tract in question was a park, and that the appellant thereafter received the benefit of such sales by collecting the installments of purchase money as they matured. Without regard to the original authority of appellant's president and selling agent, it is impossible to conclude, in the face of undisputed evidence of these facts, that the appellant corporation was ignorant of the acts and representations of its agents, or that it had failed to ratify the same. No evidence was offered by it to contradict or in any manner explain that offered by the respondents. The trial court properly held the tract to have been dedicated as a public park.

The judgment is affirmed.

PARKER, DUNBAR, CHADWICK, FULLERTON, GOSE, MORRIS,
and MOUNT, JJ., concur.

[No. 7844. Decided April 9, 1909.]

J. M. CUMMINGS, *Appellant*, v. JAMES DOLAN, *Respondent*.¹

PRINCIPAL AND AGENT—POWER OF ATTORNEY—CONSTRUCTION. A power of attorney to convey any land of the grantors, excepting a farm occupied by them in Green River Valley, authorizes the attorney to convey a lot in the Green River Valley that had never been occupied by the grantors.

VENDOR AND PURCHASERS—RESCISSION BY VENDEE—DEFECTS IN TITLE—WAIVER OF OBJECTION. Objection to a title for want of identification of a person in the chain of title, who conveyed without signing her middle initial, is waived by failing to call attention to such want of identification, when asking for the correction of certain defects.

SAME—PLEADING—NECESSITY OF PLEADING WANT OF ACCESS. A vendee cannot refuse to close the deal for want of any ingress or egress to the property where that fact was not pleaded.

SAME—DEFECT IN TITLE—CLOUD—MORTGAGE BY STRANGERS. The existence of mortgages upon property, given by mistake by strangers to the title, are not clouds on the title warranting rescission by the vendee for want of a marketable title, especially after such strangers cured the objection by quitclaim deed.

SAME—"MARKETABLE" TITLE. A contract for a marketable title only calls for one that is reasonably free from doubt.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered October 6, 1908, in favor of the defendant, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action to recover earnest money paid under a contract to purchase land. Affirmed.

John E. Ryan, for appellant.

Godman & Embree, Aust & Terhune, and *W. A. Keene*, for respondent.

CROW, J.—Action by J. M. Cummings vs. James Dolan to recover \$500 earnest money paid by plaintiff to the defendant on a contract for the purchase of real estate. A verdict was returned in favor of the plaintiff, but the trial court sustained defendant's motion for judgment notwithstanding the

¹Reported in 100 Pac. 989.

Apr. 1909]

Opinion Per CROW, J.

verdict, and dismissed the action. The plaintiff has appealed.

The undisputed evidence shows that on November 3, 1906, the respondent executed and delivered to the appellant the following written instrument:

"Seattle, Washington, November 3, 1906.

"Received from J. M. Cummings the sum of Five hundred (\$500.00) Dollars as deposit and part of purchase price of the property herein described, viz.: The Southeast quarter (SE $\frac{1}{4}$) of the Southeast quarter (SE $\frac{1}{4}$) of Lot twelve (12), Section twenty-six (26), township 21, Range 5 East; also lots six and seven (6 & 7), Section 25, township 21, Range 5 East, containing 91.25 acres lying and being in King County, Washington, together with all appurtenances thereunto belonging. The above deposit to be held by me in trust for the owner. The total purchase price for said property is Thirty-six hundred fifty dollars (\$3,650.00), payable as follows: Two thousand dollars (\$2,000) cash in hand (including the amount of this receipt) to be paid on approval of abstract, and balance to be paid, viz., Eight Hundred and twenty-five (\$825.00) dollars on November 3, 1907, and Eight Hundred and twenty-five (\$825.00) dollars on May 3, 1908, with interest on deferred payments at the rate of seven per cent per annum until fully paid, the same to be secured by mortgage on said property.

"The purchaser shall be furnished a complete abstract showing good and marketable title in the owner and be allowed ten days for examination thereof, whereupon he agrees to complete the purchase in the manner and upon the terms herein, and that in case of his failure so to do, the said sum of money hereby receipted for shall be forfeited as liquidated damages.

"It is further agreed that if the title is not good and cannot be made good within a reasonable time thereafter, the said sum of money this day paid shall be refunded.

"Subject to owners approval. James Dolan, Agent.

"J. H. Van Asselt, Witness.

"I hereby agree to the above provision.

"J. M. Cummings, Purchaser."

that shortly thereafter the respondent furnished an abstract of title which appellant delivered to his attorney for

examination and an opinion, at the same time authorizing the attorney to represent him in passing upon the title and closing the deal; that the attorney directed respondent's attention to certain alleged defects in the title, as shown by the abstract, and requested him to correct the same as follows: (1) An unsatisfied real estate mortgage from W. G. Simpson and Sarah P. Simpson, his wife, to Lilienthal & Co. on lot seven of the land above mentioned; (2) an unsatisfied chattel mortgage from W. G. Simpson and wife to Lilienthal & Co. on a hop crop on lot seven; and (3) an agreement between W. G. Simpson and wife and Lilienthal & Co. reciting that Simpson was the owner of lot seven; that to remedy these alleged defects the respondent procured quitclaim deeds from W. G. Simpson and Sarah P. Simpson, his wife, to lot seven, and an affidavit from W. G. Simpson showing that neither he nor his wife, Sarah P. Simpson, ever had or claimed any interest, ownership, or title in or to lot seven, and that the mortgages and agreement executed by them had by mistake described the land in question, instead of other lands which Simpson and wife did own, and which they actually intended to encumber.

The evidence further shows that the mortgages and agreement were executed in 1892; that Simpson and wife had never been in possession of the land; that the abstract failed to connect them with the chain of title; that it only disclosed the mortgages and agreement as being of record; that the respondent was ready, willing, and able to complete the sale on his part, and offered to do so; that appellant's attorney, after the above corrections of the title had been made, notified respondent's attorney there was no ingress to, or egress from, the land, and that by reason thereof his client would not complete the purchase or make payment. The appellant now calls attention to the further fact that the abstract shows the title to have been at one time held by one Jennie L. Shafer, that it was afterwards conveyed by Jennie Shafer, and that no identification of Jennie L. Shafer and Jennie Shafer as

Apr. 1909]

Opinion Per CROW, J.

one and the same person has been furnished. This alleged defect was not called to the respondent's attention, nor was he requested to cure the same by furnishing evidence of identification, or in any other manner, at any time prior to the appellant's refusal to complete the purchase.

The appellant further contends that the quitclaim deed from Sarah P. Simpson was executed by William G. Simpson as her attorney in fact, that the power of attorney contained the following: "Excepting, however, the farm occupied by me and my husband as a homestead in Green River valley, King county, Washington, to which land and farm this power of attorney does not extend"; that lot seven above described was located in Green River valley, and that a presumption arises that W. G. Simpson was not authorized to execute the quitclaim deed under the power of attorney. The uncontradicted evidence is that neither W. G. Simpson nor his wife ever lived upon the land in dispute in this action. This being the fact, he had authority to execute the quitclaim deed under his power of attorney.

Appellant vigorously insists that the defects to which he actually directed the attention of respondent's attorney, were such a serious cloud upon the title as to render it bad and unmarketable, and that the instruments obtained by respondent did not cure the same or remove the cloud. Respondent contends that the title as originally disclosed by the abstract was good and marketable; that they were unauthorized instruments executed by mistake by strangers to the title; that they constituted no cloud thereon; that if conceded to be a cloud, they were in any event cured by the quitclaim deeds and affidavit; that any technical objection as to the want of identification of Jennie L. Shafer and Jennie Shafer was waived by appellant's failure to call respondent's attention thereto; that the power of attorney authorized the execution of the quitclaim deed by W. G. Simpson for his wife, and that the appellant refused to take the land for the sole reason that he claimed there was no ingress or egress, a fact.

which he has not pleaded, and upon which he does not and cannot now rely as an excuse for nonperformance of the contract of sale upon his part. We think all of these contentions made by respondent should be sustained. While there is some conflict in the evidence on immaterial matters, there is no dispute as to any material fact. It therefore became a question of law for the court to determine what judgment should be entered. The appellant's principal objection to the title was based upon the supposed interests of Simpson and wife, and Lilienthal & Co., but under the undisputed facts it is apparent that they had no interest whatever in lot seven, they being entirely outside of the chain of title and strangers thereto. The existence and record of the instruments complained of was not a sufficient excuse for rejecting the title, especially after the respondent had procured the quitclaim deeds and affidavit to explain and remove any asserted cloud.

In *Pixley v. Huggins*, 15 Cal. 128, 134, Chief Justice Field said:

"The true test, as we conceive, by which the question, whether a deed would cast a cloud upon the title of the plaintiff, may be determined, is this: Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist; if the proof would be unnecessary, no shade would be cast by the presence of the deed."

Under this rule no shade would be cast by the presence of the Simpson mortgages and agreement. In the same case Chief Justice Field further said:

"A conveyance not falling in the chain of title, as from one who never had any connection with the property, would not constitute a cloud upon such title. No action could be supported upon such a conveyance, even in the absence of rebutting proof, any more than upon so much waste paper."

In *Ward v. Dewey*, 16 N. Y. 519, 529, Selden, J., said:

"If an entire stranger assumes to convey the premises to which he has no shadow of title, and of which another is in

Apr. 1909]

Opinion Per CROW, J.

possession, no real cloud is thereby created. There is nothing to give such a deed even the semblance of force. It can never be used to the serious annoyance or injury of the owner. A word of explanation would dissipate the apparent cloud."

In *Thompson v. Etowah Iron Co.*, 91 Ga. 538, 17 S. E. 663, the court said:

"There is a vast distinction between a deed which purports to have derived its existence through the true owner of the original and paramount title, and a deed executed by one unconnected with, and an entire stranger to, such title. There would be abundant reason to regard with apprehension a conveyance which, though really void because of some latent infirmity, bears apparently the stamp of force and validity, and assumes to trace its way through connecting links back to the fountain head from which flowed the original title. On the other hand, an instrument which springs from no definite source of right whatsoever can never properly be considered a cloud upon title."

See, also, *Dunklin County v. Clark*, 51 Mo. 60; *Lick v. Ray*, 43 Cal. 83; *Lytle v. Sandefur*, 93 Ala. 396, 9 South. 260.

Appellant's contract calls for a "good and marketable title." The authorities hold that to render a title marketable it is only necessary that it shall be free from reasonable doubt, in other words, that a purchaser is not entitled to demand a title absolutely free from every possible technical suspicion, he can only demand such title as a reasonably well informed and intelligent purchaser acting upon business principles would be willing to accept.

"A purchaser is not entitled to demand a title absolutely free from all suspicion or possible defect. He may claim a marketable title, and that means a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to accept and ought to accept." *Todd v. Union Dime Sav. Inst.*, 128 N. Y. 636, 28 N. E. 504, 506.

Such a title was tendered the appellant. His contract provided that when such title was furnished by respondent he

should complete the purchase, and that in case of his failure so to do, the \$500 earnest money should be forfeited as liquidated damages. A good and marketable title having been tendered, and appellant having failed to accept the same, the trial court properly entered judgment in favor of the respondent, notwithstanding the verdict of the jury.

The judgment is affirmed.

MOUNT, GOSE, FULLERTON, and CHADWICK, JJ., concur.

DUNBAR, MORRIS, and PARKER, JJ., took no part.

[No. 7837. Decided April 9, 1909.]

NORTH AMERICAN COMMERCIAL COMPANY, *Respondent*, v.
NORTH AMERICAN TRANSPORTATION AND TRADING
COMPANY, *Appellant*.¹

PRINCIPAL AND AGENT—SALES BY AGENT—WARRANTY—AUTHORITY OF AGENT—EVIDENCE—SUFFICIENCY—IMPLIED WARRANTY OF TITLE. An agent had authority to warrant a cargo of coal as free from incumbrances (including an unpaid duty) where it appears that a representative of the company testified that he had absolute authority to dispose of the coal, that he instructed the agent to make the best settlement possible, had wired him that the duty was paid, and the company failed, after opportunity, to show that the representative did not have the authority claimed by him; especially where it had constructive possession, which raises an implication of warranty of title.

CUSTOMS, DUTIES—REBATE—EXPIRATION OF TIME LIMIT FOR REBATE—STATUTES—CONSTRUCTION. Foreign coal discharged in October, 1903, from a disabled vessel at a port other than her destination, and kept in the custody and control of the government, is not relieved from the payment of duty by Act of Cong. Jan. 15, 1903, (32 Stat. 773) which provides for a full rebate of duties on coal for the period of one year, where no entry of the coal had been made and no rebate made by the collector until after said statute had expired by limitation; and the same was subject to duty when sold on March 4th, 1904.

SALES—WARRANTY AGAINST INCUMBRANCES—PAYMENT OF DUTY—FAILURE OF VENDEE TO GIVE NOTICE. Where the purchaser of foreign coal was not notified within ten days of the reliquidation of duty

¹Reported in 100 Pac. 985.

Apr. 1909]

Opinion Per Gose, J.

on the coal, and the statute made the decision of the collector final unless appeal was taken in ten days, the purchaser's failure to notify the vendor of the lien for the duty within time to enable the vendor to take an appeal and contest the duty will not deprive the purchaser of his right to recover the duty which he was required by the government to pay, under the vendor's warranty that the coal was free from incumbrances.

Appeal from a judgment of the superior court for King county, Tallman, J., entered January 21, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Bausman & Kelleher, for appellant.

Leander T. Turner and *Frank A. Steele*, for respondent.

GOSE, J.—The appellant was the defendant below. The complaint, in substance, alleges the corporate capacity of both the appellant and the respondent; that on the 4th day of March, 1904, the appellant sold to respondent a quantity of coal, which was then lying upon the respondent's dock at Dutch Harbor, in the district of Alaska; that the appellant warranted that the coal was free and clear of all liens and incumbrances; that the respondent paid the appellant the purchase price of the coal; that such coal had been imported by the appellant, and was, at the time of the sale, subject to the payment of an import duty; that after the purchase, the respondent was required to make entry of the coal, and on the 5th day of September, 1904, it was compelled by the United States, as a condition precedent to obtaining possession of the coal, to pay the sum of \$631.28 as duty thereon; that at the time of the purchase the respondent did not know that the coal was subject to the payment of duty, and relied upon the appellant's warranty that it was clear and free of incumbrance. The answer joined issue upon all the averments of the complaint, except that it admitted the payment of the duty by the respondent; that the coal was foreign, and

the corporate capacity of both the appellant and the respondent. The case was tried to the court, resulting in a judgment in favor of the respondent for the amount claimed. From this judgment, the appeal is prosecuted.

As we have stated, the pleadings admit that the coal was foreign, and that, before the respondent could obtain possession of the coal, it was required to pay the government, as an import duty on the coal, the amount for which the judgment was entered. We gather the following facts from the evidence: In the fall of 1903, the appellant shipped a cargo of British Columbia coal on board the steamship Meteor from Seattle, consigned to itself at Nome, Alaska; that on October 26, 1903, the vessel, being disabled, was towed into Dutch Harbor, Alaska, and discharged a quantity of sacked coal which later it sold to the respondent; that the appellant did not make entry of the coal; that the respondent was required by the government to enter it for consumption and pay the duty, before it could obtain possession; that after the sale, the deputy collector at Dutch Harbor rebated the duty, under an act of Congress which expired by limitation January 15, 1904; that the collector, at Juneau, on July 2, 1904, reliquidated the entry, and charged the coal with the payment of a duty; that on September 5, following, the respondent received notice of such reliquidation from the collector, paid the duty, and at once forwarded its protest to such collector, who in turn forwarded it to the board of general appraisers at New York, where the appeal was dismissed because it was not taken within ten days after the reliquidation by the collector. The evidence further shows that one Isted, a resident of Seattle representing the appellant, directed one Baggs, at San Francisco, to sell the coal; that he sold it to the respondent at San Francisco, California, and warranted to it that it was free from incumbrances; that at the time of such purchase, the respondent did not know that it was subject to the payment of duty, but relied upon the representations and warranty of the agent Baggs.

Apr. 1909]

Opinion Per GOSSE, J.

The appellant assigns eleven errors, which in its brief it argues under two principal heads: (1) It contends that the sale was without an express warranty, and that Baggs did not have authority to warrant; (2) that even if there was a warranty against incumbrances, the respondent cannot recover in this action for the reasons (1) that the appellant was not notified of the imposition of the duty, and (2) because if notice had been given, the appellant could have defeated its collection.

Considering these questions in the order stated, we have seen that Baggs expressly warranted the coal to be free from incumbrance. We will therefore consider whether Baggs had legal authority to warrant. As we have said, his authority was derived from one Isted, the agent of the appellant. The agent Isted was offered as a witness for the appellant, and interrogated respecting the sale of the coal as follows:

"Q. Did you have charge of that cargo, handling of that cargo, and adjusting it? A. I disposed of it for the account of the North American people. Q. And you disposed of it for the North American Trading & Transportation Company? A. Yes, sir. Q. Representing that company, did you authorize Mr. Baggs to make a sale of that coal? A. Yes, sir."

Whereupon the following letter from Isted was admitted in evidence:

"March 4, 1904.

"Montgomery Baggs, Esq., San Francisco, Cal.

"Dear Mr. Baggs: Your letters of the 9th and 11th were duly received. After reading your letter of the 9th regarding the coal and as Mr. Snowdon gave me absolute authority to dispose of this I think you had better make the best settlement you possibly can for the N. A. T. & T. Co. I think, however, the remarks as to the loss of two pounds per sack is small particularly as the N. A. C. takes half the bags which were extra heavy and worth much more than two pounds of coal. However, as I said before, you better do the best you can. Inasmuch as Mr. Snowdon is now in Chicago and Bausman on his way to Los Angeles, I wired to arrange a bill of

sale as he holds the North American T. & T. Company's power of attorney and that is what we require."

Isted had theretofore wired Baggs in relation to the transaction: "Duty has been paid." It will be observed that Isted states that Mr. Snowdon, who the evidence shows was at the time the secretary of the appellant corporation, had given him absolute authority to dispose of the coal; that he directed Baggs to make the best settlement he could. Both Baggs and Isted were engaged in marine insurance. The appellant had the opportunity to show that Isted did not have the authority which he claimed and which he delegated to Baggs, but did not do so. We are therefore persuaded that Baggs had express authority to warrant the coal to be free from incumbrance. Moreover, the coal was in the constructive possession of the appellant at the time of sale, and the law, therefore, raises an implication of warranty of title. 15 Am. & Eng. Ency. Law (2d ed.), pp. 1216-17; *Shattuck v. Green*, 104 Mass. 42.

(2) We will consider these propositions in the inverse order of their statement. The coal was subject to the duty which the respondent paid. Act of Congress of July 24, 1897 (30 Stats. at Large, 190). The appellant argues that this act was suspended by the law of January 15, 1903 (32 Stats. at Large, 773), which provides that the secretary of the treasury shall "make full rebate of duties imposed by law" on all coal imported from foreign countries "for the period of one year from and after the passage of this act." The respondent states his position on this question as follows:

"The point to be observed is that, upon discharge of the cargo, it goes into the custody of the government, there to remain until either it is entered and duties paid or it is reliquidated. The situation is precisely the same as though the cargo had gone into a bonded warehouse upon original importation."

It will be observed that the cargo had not reached the port to which it had been consigned, but that the vessel had been

Apr. 1909]

Opinion Per Goss, J.

disabled and towed into harbor where she had discharged a part of her cargo. Such cargo was thereafter under the control and supervision of the government. U. S. Rev. Stats., paragraphs 2891-2894. As we have said, the appellant had made no entry of the coal at the time of sale. The rebate statute had then expired by limitation. Speaking to this question, it is said in *Hartranft v. Oliver*, 125 U. S. 525, 8 Sup. Ct. 958, 31 L. Ed. 813:

"In other words, goods imported before the act took effect, if kept in the custody and control of the government, are to be charged with duties according to the law in force when they are entered for consumption; that is, when passed over to the control of the importer or owner. The place in which the goods are thus kept is not the essential fact, but the custody of the government, and the consequent exclusion of control over them by the owner."

Again, in *Merritt v. Cameron*, 137 U. S. 542, 11 Sup. Ct. 174, 34 L. Ed. 772, at page 551, it is said:

"The first clause of the section means simply that, if there has been no change in the rate of duty after the merchandise has been entered in bond, and the withdrawal of the merchandise takes place afterwards within one year from the date of the importation, the duties to be paid are such as are fixed by the law in force at the date of withdrawal."

It follows from the rule announced in these cases, that the coal when sold was subject to a lien for the duty which the respondent paid. This being true, the purchaser could redeem from the lien and recover from the vendor the sum paid for redemption. *Ranney v. Meisenheimer*, 61 Mo. App. 434; *Sargent v. Currier*, 49 N. H. 310, 6 Am. Rep. 524; *Cahill v. Smith*, 101 N. Y. 355; 15 Am. & Eng. Ency. Law (2d ed.), pp. 1252-3. The cases cited by the appellant, which it asserts announce that the rebate statute applied, all follow the rule announced in the case of *Meredith v. United States*, 13 Peters 486, 10 L. Ed. 260. The principal question in that case was whether the duty acts created a personal indebtedness in favor of the government and against the importer.

The court held that they did; and while it is also held that the duty was collectible by the government at the time the goods entered the port, yet the cases from the same court from which we have quoted are later expressions of the court's views, and we are content to follow them.

We will next consider the question of the failure of the respondent to give the appellant notice that it had been required to pay the duty, so that it might have the opportunity to review the action of the collector before the board of general appraisers and the circuit court having jurisdiction of the cause. Section 14, p. 137, 26 Stats. at Large, provides that, "The decision of the collector as to the rate and amount of duties chargeable upon imported merchandise," shall be final and conclusive, unless the owner shall, within ten days from the liquidation of the duty, give written notice to the collector setting forth his objections to the same. The time fixed in this statute is jurisdictional. *In re Guggenheim Smelting Co.*, 112 Fed. 517.

The coal was reliquidated at Juneau, Alaska, July 2, 1904, and the respondent did not receive notice of such action until September 5, following. The time within which to appeal to the board of general appraisers at New York had long since expired. However, it filed its protest with the collector as required by law, the same was transmitted to the board, and its appeal dismissed on the ground that it had not been taken within the time limited by law. It is true that the law gave it the right of appeal to the circuit court, but the same jurisdictional question would have precluded a review by the court.

The respondent cannot, therefore, be penalized for a failure to do an impossible thing. As we have seen, the primary obligation to pay the duty was on the appellant. Under the circumstances, the decision of the collector will be considered as conclusive of appellants liability to reimburse the respondent for the sum it was required to pay.

Apr. 1909]

Statement of Case.

For the reasons stated, the judgment will be affirmed.

CHADWICK, FULLERTON, MOUNT, CROW, and DUNBAR, JJ.,
concur.

MORRIS and PARKER, JJ., took no part.

[No. 7558. Decided April 10, 1909.]

FRANK MALFA *et al.*, *Respondents*, v. WILLIAM F. CRISP,
Appellant.¹

APPEAL—RECORD—STATEMENT OF FACTS. In the absence of a statement of facts or bill of exceptions only errors predicated on the pleadings and orders can be considered.

PARTNERSHIP—ACTIONS—CONDITIONS PRECEDENT—FILING CERTIFICATE OF FIRM NAME—STATUTES—COMPLIANCE AFTER SUIT BROUGHT. Where copartners did business under a firm name other than the true name of the firm members, without filing a certificate in the county auditor's office designating their true names, as required by Laws 1907, p. 288, which further provides that they shall not be entitled to maintain any suit without alleging and proving the filing of such certificate, there is such a substantial compliance with the statute as to prevent dismissal of an action, commenced before the filing of the certificate, where long before trial they filed the certificate and obtained leave to amend their complaint, which amendment was made before the statute of limitations had run against their action and after answer by the defendants, who did not stand upon the demurrer; since the defendants are not prejudiced thereby.

MECHANICS' LIENS—NOTICE—AMENDMENTS—AFTER SUIT—ERROR IN DESCRIPTION. Under Bal. Code, § 5904, authorizing the amendment of lien notices where interests of third parties are not affected, a lien notice and complaint to foreclose the same can be amended to correct an erroneous description of the property, after answer by the defendant disclosing the error in the notice.

Appeal from a judgment of the superior court for Douglas county, Steiner, J., entered April 13, 1908, upon findings in favor of the plaintiffs, in an action to foreclose a mechanics' lien. Affirmed.

¹Reported in 100 Pac. 1012.

M. B. Malloy and Arthur McGuire, for appellant.

W. A. Reneau, for respondents.

Crow, J.—This action was commenced on September 18, 1907, by Frank Malfa and William Malfa, copartners as F. Malfa & Son, against William F. Crisp, to foreclose a materialmans' or mechanics' lien on real estate, in the city of Waterville, Douglas county. From a decree in favor of the plaintiffs, the defendant has appealed.

There being no statement of facts, we can consider only such assignments of error as are predicated upon the pleadings and the orders of the trial court. The respondents, whose firm name does not contain the individual names of all persons interested in their partnership, did not plead in their original complaint any compliance with chap. 145, Laws 1907, p. 288, nor did they file any certificate with the county auditor until after the commencement of this action. Appellant therefore contends that they were not entitled to maintain this action, and that it should have been dismissed. Appellant demurred to the original complaint on the ground that the respondents had no legal capacity to sue. His demurrer was overruled, but he answered instead of standing thereon. Afterwards, on December 7, 1907, the respondents filed with the county auditor the certificate required by Laws 1907, chapter 145, *supra*, and having obtained leave of court, pleaded such filing by their supplemental complaint, which was filed in this action on December 10, 1907, long before the trial, which occurred in February, 1908. Appellant now contends that the certificate was filed too late to enable the respondents to maintain this action.

In *Sutton & Co. v. Coast Trading Co.*, 49 Wash. 694, 96 Pac. 428, we held that failure to file such a certificate with the county auditor, before making the contract on which the action was based, did not invalidate the contract; and that filing of the certificate before suit, which had been done in that case, entitled the plaintiffs to maintain their action.

Apr. 1909]

Opinion Per CROW, J.

Here the certificate was filed after the filing of the original complaint, but it had actually been filed with the county auditor, and pleaded in the supplemental complaint, long before trial, and long before the eight months allowed by Bal. Code, § 5908 (P. C. § 6110), for commencing this action had expired. By his answer the appellant admitted, and in fact affirmatively pleaded, the contract between himself and respondents on which this action is based. This being true, we fail to understand how he has been prejudiced in the least degree. We think that, under these circumstances, the respondents were entitled to maintain their action already commenced, and prosecute it to final judgment. No practical advantage could have been secured to the appellant by dismissing it. Had such an order been entered, the respondents could have immediately instituted, and would have successfully prosecuted, another action to foreclose the same lien. No good purpose would have been subserved by nonsuiting them, or by throwing them out of court with costs imposed, and then permitting them to return with the same cause of action. We are of the opinion that, for the purpose of maintaining this action, they substantially complied with the spirit of the statute, by filing their certificate, and by pleading the same before trial, and before their right of action had been barred by lapse of time.

By mistake the original lien notice was so drawn as to describe lot 22, of block 8, in the original town of Waterville, instead of lot 21, in block 8. This error was not discovered until the appellant filed his answer, pleading the correct description, and alleging that he had no interest in lot 22. Thereafter the respondents, upon their application, were granted permission to amend their complaint and their lien notice by striking out "lot 22" and inserting in lieu thereof "lot 21," so as to describe the appellant's property, upon which the lien was actually claimed, and which was the property towards the improvement of which respondents had furnished materials and labor. The appellant now con-

tends that the trial court erred in permitting the amendments, and in refusing to dismiss the action for incorrect description. Bal. Code, § 5904 (P. C. § 6106), provides that:

“Such claim of lien may be amended in case of action brought to foreclose the same, by order of the court, as pleadings may be, in so far as the interests of third parties shall not be affected by such amendment. . . .”

Bal. Code, § 5917 (P. C. § 6119), provides that:

“The provisions of law relating to liens created by this chapter, and all proceedings thereunder, shall be liberally construed with a view to effect their objects.”

No contention is made by the appellant that any interests of third parties were, or could have been, affected by the amendment. In *Olson v. Snake River Valley R. Co.*, 22 Wash. 139, 144, 60 Pac. 156, this court said:

“The statute (§ 5904) provides that the lien notice may be amended, after action brought to foreclose the same, by order of the trial court, ‘as pleadings may be, in so far as the interests of third parties shall not be affected by such amendment.’ This statute is broad enough to permit an amendment as to description, . . .”

The amendment was properly granted.

By reason of the views above expressed, all other assignments of error presented by the appellant become immaterial on this appeal, and will not be considered. The judgment is affirmed.

MOUNT, CHADWICK, FULLERTON, and GOSE, JJ., concur.

Apr. 1909]

Opinion Per CROW, J.

[No. 7684. Decided April 10, 1909.]

MINNIE B. P. NUNN *et al.*, *Appellants*, v. MARY STEWART
et al., *Respondents*.¹

TAXATION—TAX TITLE—ACTION TO SET ASIDE—CONDITIONS PRECEDENT—TENDER OF TAX. An action to set aside a tax deed and quiet title is properly nonsuited where it is not alleged or proved that the plaintiff tendered to the defendant holders of the tax title all taxes, penalties, interest, and costs, paid by them at the tax sale, the same being made a condition precedent to action by Bal. Code, § 5679.

Appeal from a judgment of the superior court for King county, Morris, J., entered March 27, 1908, granting a nonsuit in an action to set aside tax deeds and quiet title. Affirmed.

S. S. Langland, for appellants.

Byers & Byers, for respondents.

CROW, J.—This action was commenced by Minnie B. P. Nunn and A. H. Nunn, her husband, against Mary Stewart, A. G. Mather and A. J. Stretch, to set aside, cancel, and annul certain tax deeds held by the defendants, and to quiet title to real estate in the city of Seattle. From a judgment of nonsuit in favor of the defendants, the plaintiffs have appealed.

The appellants contend that the trial court erred in granting the nonsuit and dismissing the action. In their complaint they plead title in themselves, through their immediate grantors, L. S. J. Hunt and wife, and allege, that in 1901 the respondents Mary Stewart, and A. G. Mather as plaintiffs foreclosed two delinquent tax certificates on the lots in question, against L. S. J. Hunt and wife as defendants; that the only service of process in the foreclosure proceedings was made by the publication of summons, which was void;

¹Reported in 100 Pac. 1004.

that the judgments entered thereon were also void; that in pursuance of such void judgments, tax sales were made, and treasurer's deeds were delivered, to Mary Stewart and A. G. Mather, under which they and the respondent A. J. Stretch claim title; that the deeds are a cloud on appellants' title; that in March, 1901, upon a motion made by the appellants and by their grantors, L. S. J. Hunt and wife, in the original tax foreclosure proceedings, the decrees were, after notice to the respondents, set aside, purged of the record, and held to be null and void for want of jurisdiction; that thereafter on April 2, 1907, the appellants paid to the county the delinquent taxes, and redeemed the lots from the certificates of delinquency, and that the respondents are now claiming some interest or title under and by virtue of their tax deeds, which are a cloud on appellants' title. After a demurrer to the complaint had been overruled, the respondents by their answer denied all the allegations of the complaint, except those pleading the tax foreclosure proceedings, which proceedings respondents affirmatively alleged were regular and valid. They further alleged, that the proceedings to set aside the foreclosure decrees were irregular, null and void; that respondents claim title under their tax deeds; that the appellants have not tendered them any sum of money whatever; that respondents have been in possession since 1901; and that no demand has been made upon them for possession.

By this action the appellants are attempting to set aside tax deeds under which the respondents claim title, and under which, as shown by the evidence, the respondent Stretch holds actual possession of at least a portion of the lots. Appellants did not plead, nor did they upon the trial introduce evidence to show, any tender to the respondents of the taxes, penalties, interest, and costs paid by them. It was necessary for appellants to do so as a condition precedent to the maintenance of this action.

In *Ryno v. Snyder*, 49 Wash. 421, 424, 95 Pac. 644, we said:

Apr. 1909]

Opinion Per CAW, J.

"Bal. Code, § 5679 (P. C. § 8734), provides that in an action for the recovery of lands sold for taxes, against the person in possession, the complainant must state that all taxes, penalties, interest and costs, paid by the purchaser at tax sale, his assignees or grantees, have been fully paid or tendered, and payment refused. As above stated, this action has been brought to recover possession of land sold for taxes. It is prosecuted against appellant in possession as grantee of Kennedy, who as purchaser at the tax sale paid all taxes, penalty, interest and costs for which the tax judgment had been entered. Section 5679, *supra*, clearly contemplates that under such circumstances a tender shall be made to such purchaser, or his successor in interest, so that he may have an opportunity either to refuse the tender or to avoid litigation by accepting the same. It does not contemplate that he may be subjected to the costs and annoyance of an action for possession, in which the validity of his tax title will be questioned, without any previous tender having been made to him which he might at his election have accepted. . . . Any sum necessary to be paid under the statute, as a condition precedent to the prosecution of this action for a recovery of the land, should have been tendered to the holder of the title under the tax deed, or some good and sufficient reason should have been alleged and shown for failing to make such tender. For want of any allegation of a tender to the appellant, the complaint failed to state a cause of action, and as its allegations were not afterwards aided or supplemented by proof, the appellant's motion for a nonsuit should have been granted."

We regard the above authority as controlling in this case. The nonsuit was properly granted. The judgment is affirmed.

MOUNT, FULLERTON, GOSE, DUNBAR, PARKER, and CHADWICK, JJ., concur.

MORRIS, J., took no part.

[No. 7565. Decided April 12, 1909.]

HONORA GARVEY, *Respondent*, v. ANDREW GARVEY,
Appellant.¹

QUIETING TITLE—RELIEF—RECOVERY OF POSSESSION—EJECTMENT. Where a plaintiff, out of possession, brings an action to cancel her deeds to a grantee in possession and to quiet her title to the property conveyed, the action is essentially one to recover possession, in which the court may quiet title and award possession.

QUIETING TITLE—PLEADING—DEFENSES NOT PLEADED—ISSUES—JUDGMENT—EFFECT. Under Bal. Code, § 5508, requiring the defendant in an action to quiet title to set up his claim, and § 5509, excluding evidence of any estate not pleaded in the answer, the offer in evidence at the trial of a deed not pleaded, nor recorded when the suit was commenced, comes too late, and the court may refuse to allow an amendment; and judgment quieting title has the effect to vacate the deed recorded after action brought.

LIMITATION OF ACTIONS—ACCRUAL—TRUSTS—CESSATION OF TRUSTS—CANCELLATION OF INSTRUMENTS. The statute of limitations does not run against an action the gist of which was to set aside a deed to grantor's son, made in trust upon false representations, until the son repudiates the trust; although there were some allegations of fraud and undue influence, and an action for relief on the ground of fraud is to be commenced within three years after discovery of the fraud.

CANCELLATION OF INSTRUMENTS—WANT OF CONSIDERATION—DISAVOWAL OF TRUST. Deeds made by a mother to her son, without consideration and in trust so that she might not lose the property, are properly set aside at her suit when the son disavows the trust.

GIFTS—EVIDENCE OF INTENT—SUFFICIENCY. Furnishing money to buy lots and build a house, by three children, is sufficiently shown to have been with intent to make a gift thereof to their mother, to whom deed was made, where she and her daughter so testify, as against the testimony of one son to the contrary.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered February 7, 1908, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action to quiet title. **Affirmed.**

O. C. Moore, for appellant.

Del Cary Smith and *L. J. Birdseye*, for respondent.

¹Reported in 101 Pac. 45.

Apr. 1909]

Opinion Per MOUNT, J.

MOUNT, J.—The plaintiff brought this action to set aside two certain deeds, executed by her to the defendant for certain real estate, in the city of Spokane, and to quiet title against the claims of the defendant. After issues were joined and a trial had to the court without a jury, findings were made in favor of the plaintiff, and a decree entered cancelling the deeds and declaring that the defendant had no right in or title to the property, and quieting title in the plaintiff. The defendant has appealed from that decree.

The main facts are as follows: Respondent is the mother of the appellant. At the time this action was begun, in the year 1907, the respondent was a widow seventy-four years of age. She had no property except the real estate in question. She had been supported many years by her three children, viz., Thomas Garvey, Nora Nickerson, and Andrew Garvey, the appellant. In the year 1901, the three children, in order that the old lady might have a home of her own, concluded that they would purchase for her a lot in Spokane and construct a small house thereon. The money for the purchase of the lot was furnished by the son Thomas Garvey. The lot in question was purchased by Mrs. Nickerson, and the deed therefor was made by the vendor direct to the respondent. Thereupon Mrs. Nickerson furnished a part of the money to construct the little house, and part was furnished by Thomas Garvey, and a part by the appellant. When the house was finished, the respondent and appellant lived together therein for several years.

On August 30, 1904, the respondent executed a deed of the property to her son the appellant. This deed was without consideration, and was made because of trouble between the children, the appellant telling his mother that, if she did not execute the deed to him, others would take the property from her; that if the deed was made to him the property would remain hers. Thereafter the appellant and respondent lived together in the house. In February, 1907, the respondent executed another deed for the same property to appellant.

This deed was without consideration, and respondent protested against making it, but was informed by appellant that her daughter, Mrs. Nickerson, claimed to own the property, and unless another deed was made to him the property would be eaten up in litigation; that if the deed was executed, appellant would hold the property for her as long as she lived. After this deed was made, the appellant claimed to own the property, turned his mother out, and refused to provide for her.

In November, 1907, the respondent brought this action to set aside the two deeds above mentioned, alleging the facts as above stated, and also certain threats and fraudulent representations made to her by the appellant; and prayed to have the deeds set aside and her title to the property quieted. The appellant answered, admitting that the property was originally deeded to his mother, and that she had made the two deeds above referred to, but denied all the other allegations of the complaint; and for an affirmative defense the appellant alleged, that the respondent for many years had been destitute and was a confirmed inebriate, morally and mentally irresponsible; that she had been a constant charge upon her children; that appellant and his brother Thomas Garvey furnished the money to purchase the property in question, which was conveyed to the respondent upon the express agreement that the title should remain in her name so long only as the respondent would continue to live and make her home thereon, or until such earlier time as appellant should request a conveyance of the property to himself; that the conveyances named in the complaint were made in pursuance of this agreement. The new matter alleged in the answer was denied by a reply. The appellant makes many assignments of error. They are discussed under six specific heads, and we shall notice them in the same way and order.

It is first claimed that the decree is too broad, because the real object of the suit is to determine the validity or effect of the deeds; while the decree not only vacates the deeds, but

Apr. 1909]

Opinion Per MOUNT, J.

goes further and debars the appellant from any claim of right, and quiets title to the property in the respondent. Appellant contends that this is not an action to recover possession of the property, but merely to set aside certain deeds and quiet title; that the right to possession under the statute is the principal right, and the quieting of title is a mere incident to the principal right. We think the action is essentially one to recover possession, as well as to set aside certain deeds and to quiet title. We have, however, in several recent cases departed from the rule contended for by appellant. In the case of *Carlson v. Curren*, 48 Wash. 249, 93 Pac. 315, after referring to the earlier cases, we said:

"But these cases were overruled on that point in the recent case of *Brown v. Baldwin*, 46 Wash. 106, 89 Pac. 483. In the last-cited case we held that one out of possession claiming land by an equitable title could maintain an action to quiet title against one in possession, and that in such an action full and adequate relief will be granted even to the extent of awarding possession, if such an award be necessary."

This rule is clearly applicable to the facts in this case. Here the respondent is seeking to maintain her title. The right of possession is not questioned. This right depends upon the title and, of course, follows it. In quieting title in the respondent, the court necessarily adjudicated the right of possession.

During the trial of the case, the appellant produced a deed dated June 22, 1901, from respondent to appellant. This deed was not recorded until after the action was begun. No reference was made to it in the answer. Appellant offered it in evidence at the trial, and asked leave to amend the answer so as to set it up as a defense. Both offers were refused. Appellant argues that these rulings were erroneous, and that the decree also vacates this deed without a hearing being accorded to the grantee. No doubt the decree has the effect to vacate this deed. The appellant at the time he filed his answer must have known of the deed, and if he relied upon it,

then was his time to plead it. He had an opportunity to do so, but for some reason, not disclosed, he did not then rely upon it or plead it. He was clearly too late at the trial of the case. Under chapter 1 of the Code, relating to actions for possession of and quieting title to real property, Bal. Code, § 5508 (P. C. § 1144), provides:

"The plaintiff in such action shall set forth in his complaint the nature of his estate, claim, or title to the property, and the defendant may set up a legal or equitable defense to the plaintiff's claims; and the superior title, whether legal or equitable, shall prevail."

And Bal. Code, § 5509 (P. C. § 1145), of the same chapter provides:

"The defendant shall not be allowed to give in evidence any estate in himself or another in the property, or any license or right to the possession thereof, unless the same be pleaded in his answer. If so pleaded, the nature and duration of such estate or license or right to the possession shall be set forth with the certainty and particularity required in a complaint."

This statute clearly prevented the reception of this deed in evidence at the trial. The action was brought to set aside all the deeds of record at the time the action was begun. This deed was not one of them, because it was not of record until after the action was begun, although it was executed several years before.

Appellant next argues that, as to the deed dated August 30, 1904, the action is barred by the statute of limitations. The action was begun in November, 1907. Cases are cited to the effect that an action for relief upon the ground of fraud must be brought within three years of the discovery of the fraud. It is true there are some allegations of fraud and coercion and undue influence contained in the complaint; but the gist of the averments is as the court found, that the respondent deeded the property to her son in trust, under his representation that the title would still remain in her. She retained possession and lived upon the property thereafter

Apr. 1909]

Opinion Per Mount, J.

until the year 1907. It was not until that year that appellant excluded her from the property and claimed the same as his own. Under these circumstances, the statute of limitations did not begin to run until the appellant disavowed the trust and claimed title in himself. 25 Cyc. 1169. The action was begun within a short time thereafter, and was not barred.

In the next two assignments it is argued that the court was not warranted in setting the deeds aside. This depends upon the facts. After a careful reading of the evidence, we are satisfied that the court correctly concluded that the deeds in question were made without consideration and in trust so that the respondent might not lose the property. If the property in fact belonged to the respondent, she did not by her deeds to appellant part with more than the legal title, and that only in trust. When the son disavowed the trust, she might recover her title. No useful purpose would be subserved by reciting the evidence in this case.

It is next argued that the facts show that the legal title stood in respondent in trust for her three children who had furnished the money for the purchase thereof; but we think it appears reasonably certain that the property was purchased as a gift from the children to the mother, and was so treated by all of them until the appellant attempted to acquire legal title by means of the deeds in controversy. At the trial the respondent and her daughter, who made the purchase and furnished part of the money for the improvements, testified directly that the property was a gift to the mother. The appellant alone testified directly to the opposite. But in view of the character of his testimony, the trial court was not impressed with his statements, and we think the trial court was justified therein.

It is argued lastly that the unrecorded deed, hereinbefore mentioned as executed in the year 1901, shows that the respondent had parted with all her title. What we have said above in regard to this deed disposes of this contention.

We find no error in the record. The judgment of the trial court appears to be right, and is therefore affirmed.

CHADWICK, FULLERTON, CROW, and DUNBAR, JJ., concur.
GOSE, PARKER, and MORRIS, JJ., took no part.

[No. 7787. Decided April 12, 1908.]

ETTA WILSON, *Respondent*, v. PUGET SOUND ELECTRIC
RAILWAY, *Appellant*.¹

CARRIERS — CONTRIBUTORY NEGLIGENCE — AUTOMOBILES — IMPUTED NEGLIGENCE. The negligence of the driver of an automobile for hire is not imputable to a passenger.

SAME—NEGLECTENCE OF PASSENGER IN AUTOMOBILE. A passenger in an automobile for hire, riding beside the driver, is not guilty of contributory negligence in not warning, advising, or directing the driver in cases of emergency, or in not attempting to control the acts of the driver in passing other cars.

STREET RAILWAYS—NEGLECTENCE—EXCEEDING SPEED LIMIT. It is negligence *per se* for a street car to exceed the speed limit.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 18, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for the death of plaintiff's husband killed in a collision of a street car and an automobile. Affirmed.

James B. Howe and *Hugh A. Tait*, for appellant, contended, among other things, that it has been held that negligence of the driver of a private vehicle is in all cases imputable to the passengers in such vehicle. *Evensen v. Lexington etc. R. Co.*, 187 Mass. 77, 72 N. E. 355; *Yarnold v. Bowers*, 186 Mass. 396, 71 N. E. 799; *Kane v. Boston Elevated R. Co.*, 192 Mass. 386, 78 N. E. 485; *Dryden v. Pennsylvania R. Co.*, 211 Pa. 620, 61 Atl. 249; *Lightfoot v. Winnebago Traction Co.*, 123 Wis. 479, 102 N. W. 30; *Ritger v. Milwaukee*, 99 Wis. 190, 74 N. W. 815, 28 Am.

¹Reported in 101 Pac. 50.

Apr. 1909]

Citations of Counsel.

Rep. 558; *Mullen v. Owasso*, 100 Mich. 103, 58 N. W. 663, 43 Am. St. 436, 23 L. R. A. 693; *Omaha etc. R. Co. v. Talbott*, 48 Neb. 627, 67 N. W. 599; *Payne v. C. R. I. & P. R. Co.*, 39 Iowa 523; *Slater v. Burlington etc. R. Co.*, 71 Iowa 209, 32 N. W. 264; *Crampton v. Ivie Bros.*, 126 N. C. 894, 36 S. E. 351; *Whittaker v. Helena*, 14 Mont. 124, 35 Pac. 904, 43 Am. St. 621. While perhaps the greater weight of authority is to the contrary, still it is incumbent upon a passenger of a private vehicle to use ordinary care to protect himself from apparent danger. *Cable v. Spokane & Inland Empire R. Co.*, 51 Wash. 619, 97 Pac. 744; *Colorado etc. R. Co. v. Thomas*, 33 Colo. 517, 81 Pac. 801, 70 L. R. A. 681; *Brannen v. Kokomo etc. Gravel Road Co.*, 115 Ind. 115, 17 N. E. 202, 7 Am. St. 411; *Cincinnati etc. R. Co. v. Howard*, 124 Ind. 280, 24 N. E. 892, 19 Am. St. 96, 8 L. R. A. 593; *Miller v. Louisville etc. R. Co.*, 128 Ind. 97, 27 N. E. 339, 25 Am. St. 416; *City of Vincennes v. Thuis*, 28 Ind. App. 523, 63 N. E. 315; *Willfong v. Omaha etc. R. Co.*, 116 Iowa 548, 90 N. W. 358; *Bush v. Union Pac. R. Co.*, 62 Kan. 709, 64 Pac. 624; *Missouri etc. R. Co. v. Bussey*, 66 Kan. 735, 71 Pac. 261; *Louisville & N. R. Co. v. Molloy's Adm'r*, 28 Ky. Law 1113, 91 S. W. 685; *State v. Boston & M. R. Co.*, 80 Me. 430, 15 Atl. 36; *Smith v. Maine Cent. R. Co.*, 87 Me. 339, 32 Atl. 967; *Allyn v. Boston etc. R. Co.*, 105 Mass. 77; *Kane v. Boston Elevated R. Co.*, *supra*, and cases cited; *Cunningham v. Thief River Falls*, 84 Minn. 21, 86 N. W. 763; *Illinois Cent. R. Co. v. McLeod*, 78 Miss. 334, 29 South. 76, 84 Am. St. 630, 52 L. R. A. 954; *Holden v. Missouri R. Co.*, 177 Mo. 456, 76 S. W. 973; *Fechley v. Springfield Traction Co.*, 119 Mo. App. 358, 96 S. W. 421; *Hajsek v. Chicago etc. R. Co.*, 5 Neb. (Unof.) 67, 97 N. W. 327; *Brickell v. New York Cent. etc. R. Co.*, 120 N. Y. 290, 24 N. E. 449, 17 Am. St. 648; *Anderson v. Metropolitan St. R. Co.*, 30 Misc. 104, 61 N. Y. Supp. 899; *Toledo etc. R. Co. v. Eatherton*, 11 Ohio Dec. 253; *Carr v. Easton*, 142 Pa. St. 139, 21 Atl. 822; *O'Toole v. Pittsburgh etc. R. Co.*, 158 Pa.

St. 99, 27 Atl. 737, 38 Am. St. 830, 22 L. R. A. 606; *Dryden v. Pennsylvania R. Co.*, *supra*; *Davis v. Chicago etc. R. Co.*, 159 Fed. 10, and numerous cases cited.

Blaine, Tucker & Hyland and *Robert C. Saunders*, for respondent.

GOSE, J.—The respondent, plaintiff below, brought this suit against the appellant, to recover damages for personal injuries received by her husband, resulting in his death. The case was tried to a jury, terminating in a verdict and judgment against the appellant. From such judgment this appeal is prosecuted.

The complaint, in substance, charges, that on the 14th day of September, 1907, the respondent's husband became a passenger in an automobile, run for hire, and was being conveyed therein from the city of Seattle to a point known as "The Meadows," some distance south of the city; that a car of the appellant, operated by electricity, through the negligence of the appellant's servants, ran into the automobile, overthrowing the same, and throwing the husband of the respondent out of the automobile, and upon the planking in the street at the point of contact, with such force and violence as to produce injuries from which he died on the 27th day of October, following. The appellant joined issue upon the question of its negligence, and pleaded affirmatively that the negligence of the respondent's husband contributed to his injury and was the proximate cause thereof. This was denied by the reply.

The undisputed evidence showed that the accident occurred on a planked street known as First Avenue South. The street at this point was about thirty-six feet in width. On either side of the street was a walk for pedestrians, about four feet in width. On the outside of each walk there was a railing about three feet in height, and on the inside a riser, about eight inches square, was spiked to the plank. This riser was the only barrier between the street and the

Apr. 1909]

Opinion Per Gose, J.

walk. The appellant was operating a double tracked electric railway over the street. The street was used generally by the public. There was not sufficient space for an ordinary vehicle to pass between cars on the tracks, or to pass between a car and the barrier. The street was practically level and straight for a fourth to a half a mile south from the point where the accident occurred.

On the day of the accident, a friend of the deceased invited him and others to go to The Meadows, and procured an automobile which was operated for hire to convey them thither. The route taken by the automobile was south along what is known as First Avenue South, the narrow planked street heretofore mentioned. The deceased sat on the front seat beside the driver. The machine followed the street car for some distance, when, owing to the dust and splinters thrown up by the car, the driver turned the machine on to the east track, and ran parallel with the car for about one-fourth of a mile. The outgoing car took the west track, and the incoming car the east track. When running parallel with the car, the machine ran along the east track.

There was a sharp conflict in the evidence as to the speed at which the machine and car were running. It was variously estimated by the witnesses at from eight to forty miles an hour. The driver of the machine, who was also its owner, testified that, before turning on to the east track, he asked the deceased "if the road was clear, . . . and he looked over and said it was; that there was not a car or anything in sight;" and he further said: "I could also see that it was; that there was nothing there in sight anywhere that I could see, and I drew out." He further said, that he ran alongside the car for a fourth of a mile; that he then saw the north-bound car approaching him about 300 or 350 yards distant; that he could have seen the north-bound car a fourth of a mile; that he was then thirty feet in the lead of the south-bound car; that upon seeing the approaching car, he increased the speed of the machine about twenty per cent, and

took a diagonal course about 150 feet; that he was then running in front of the south-bound car, about fifteen to twenty-five feet in advance of it; that he ran on that track "a little distance" before he was struck; that he increased his speed and ran in front of the south-bound car because he did not think that he had time to drop behind it and avoid a collision with the north-bound car; that the north-bound car passed before his machine was struck by the south-bound car; that his machine was carried eighty feet by the car.

It is conceded that the speed limit was twelve miles an hour. A passenger in the machine testified, that the south-bound car was running thirty-five miles an hour; that the north-bound car was running about thirty miles an hour; that when the driver started to turn in front of the south-bound car, the north-bound car was about 300 yards distant; that the driver turned in twelve or fifteen feet ahead of the north-bound car; that the machine was fully straightened out in front of the car before it was struck; that the north-bound car could have been seen for a distance of a half mile. A witness on the south-bound car testified, that the car was running very fast; that the car carried the machine sixty yards after striking it. Another witness said, the car ran seventy-five or one hundred yards after striking the machine; that the machine got in the car track fifteen or twenty feet in front of the car. Still another witness said: "When I saw him (the driver) he was straightened out, and then the street car came on him so fast that it just crashed right into him;" that the machine was traveling at the rate of twenty miles an hour, and the car at the rate of thirty miles an hour; that the car ran one hundred or one hundred and fifty feet after it turned the machine over; that it dragged the machine two hundred feet, and carried it some thirty feet before the machine turned over. A witness for the appellant said the car "stopped in about one hundred to one hundred and twenty-five feet from where the automobile had stopped and turned over."

The appellant offered evidence tending to show, that the

Apr. 1909]

Opinion Per Gose, J.

car was running at from eight to twenty-five miles an hour; that the machine turned in front of the car on a sharp curve from two to thirty-five feet ahead of the car; that the machine ran against the riser or guard rail, slackened speed, and was then struck by the car. The only evidence as to anything the deceased said or did was that, in response to an inquiry of the driver as to whether the north-bound track was clear, "he looked over and said that it was . . . that there was not a car or anything in sight." The only instruction given the driver was the statement of one Van De Vanter, who hired him, to the effect that the party wanted to go to The Meadows, and that they had "plenty" of time. Under all the evidence, the east track was clear when the machine took it. Assuming that the north-bound car could have been seen for half a mile if it was traveling at the same speed as the machine, it was not in sight when deceased looked. As we have said, the machine ran on the east track for a quarter of a mile, and then the north-bound car was from 300 to 350 yards distant.

Three errors are assigned: (1) That the court erred in denying appellant's motion for judgment at the close of the evidence; (2) that the court erred in refusing to direct a verdict for the appellant; (3) that the court erred in denying appellant's motion for a verdict notwithstanding the verdict. In legal effect the three assignments challenged the sufficiency of the evidence to support the verdict. The appellant argues (1) that the respondent's decedent was guilty of contributory negligence which precluded her recovery. Under this head it urges: (1) the chauffeur was grossly negligent; (2) under the circumstances the negligence of the chauffeur was imputable to respondent's decedent; and (3) that the evidence does not disclose any negligence on the part of the appellant. Whether the chauffeur was negligent we will not consider, except as it may appear to touch the question of the independent negligence of the deceased. The doctrine of imputable negligence has been rejected by this court.

"Where one is simply an invited guest of a voluntary driver, we do not believe the latter should be held to be such an agent of the former that the driver's negligence should be imputed to the passenger, when the passenger is without fault, and has no control over the driver or his team. Especially does this seem to be right when considered in relation to one innocent of negligence, where it appears that the accident would not have happened, even with the negligence of the driver contributing, but for the primary neglect of the defendant." *Shearer v. Buckley*, 31 Wash. 370, 72 Pac. 76.

We are content with the rule announced in this case. The question of imputable negligence was not pressed in the oral argument.

Touching the question of contributory negligence of the deceased, the general rule has been announced by this court in *Shearer v. Buckley*, *supra*, at page 376, where it said:

"Whether he was negligent and contributed to the injury was a question concerning which the minds of men might reasonably differ, and was for the jury to determine. *McQuillan v. Seattle*, 10 Wash. 464, 38 Pac. 1119, 45 Am. St. Rep. 799; *Steele v. Northern Pacific Ry. Co.*, 21 Wash. 287, 57 Pac. 820; *Traver v. Spokane St. Ry. Co.*, 25 Wash. 225, 65 Pac. 284; *Jordan v. Seattle*, 26 Wash. 61, 66 Pac. 114; *Burian v. Seattle Electric Co.*, 26 Wash. 606, 67 Pac. 214."

The appellant urges, however, that there was an advisory or supervisory duty on the deceased, under the rule announced in *Cable v. Spokane & Inland Empire R. Co.*, 50 Wash. 619, 97 Pac. 744. In this case Rufus Cable received injuries from which he died, and his daughter, a young woman seventeen years of age, was seriously injured. The injury occurred at a crossing of an interurban electric railway. The father and daughter were attempting to cross the track with a horse and buggy. The doctrine of "stop, look and listen" was applied to both father and daughter. It appears from the opinion that the father was driving the horse. We think the true general rule is announced in this case in the following language:

Apr. 1909]

Opinion Per GOSE, J.

"Ordinarily where one rides in a vehicle with the driver thereof and is injured by the negligence of a third person, to which negligence that of the driver contributes, this contributory negligence is not imputable to the passenger, unless said passenger has, or is in a position to have and exercise, some control over the driver with reference to the matter wherein he was negligent."

We think that it may be stated with the utmost safety that ordinarily two persons cannot drive or control the same horse, team, or vehicle, at the same time. But however the rule may be as to the duty of one who is not the driver, when riding in a conveyance drawn by horses, the reason for the rule has no application to the instant case. No negligent act of the deceased, either of omission or commission, is disclosed by the evidence. He did nothing and said nothing except to answer a question asked him by the driver. It is a well known fact that an automobile is an intricate machine and one which requires skill to operate. The deceased had a right to assume that the driver was competent, that he knew the capacity of his machine, and that he would not put it in a perilous position. If the machine was running at twelve or fifteen miles an hour, as testified by the driver, and the car at eight miles an hour, as testified by the motorman, when the driver started to go on to the west track, the act would not have appeared hazardous to a reasonable man. If, however, the south-bound car was traveling at a speed of forty miles an hour, and the north-bound car at thirty miles an hour, the situation was serious when the north-bound car was observed, and it would not appear to one who is not skilled in the operation of a machine how any advice from a passenger to the driver under such circumstances could aid the latter in any way. It would seem that any interference, or attempted assistance, on the part of the passenger would have tended to disconcert rather than to aid the driver. The facts are, therefore, distinguishable from those in the *Cable* case.

A case very similar to this is *Chadbourne v. Springfield St.*

R. Co. (Mass.), 85 N. E. 737. In that case the plaintiff was riding as the invited guest of the driver of an automobile on a narrow bridge. Two street car tracks crossed the bridge in the center of the roadway, so that a vehicle could not pass between the car on either track and the guard rail of the bridge. The driver of the automobile, after following the car for a distance, turned to pass it on the left, it being impossible to pass it on the right. The machine was struck by the approaching car. At page 738 the court say:

"The question of the plaintiff's due care was for the jury. She seems to have conducted herself as an invited guest of the driver of an automobile or other vehicle naturally would do. She trusted him as to the running of the machine; that is, she did not attempt to interfere with his management of the automobile. In view of her inexperience and of what might have been found to be the skill and experience of the driver, the jury might well have thought that this was a wise course on her part. Nor was there any relation of agency between her and the driver such as of itself would affect her with negligence on his part. She had no right to control him. There was no mutuality in a common enterprise between them. It cannot be said as matter of law that she ought to have warned the driver against turning out from behind the car which he had been following, especially in view of the fact that he was turning both in the direction required by statute (Rev. Laws, c. 54, § 2), and in the only direction in which the width of the bridge afforded room for him to pass that car. And she had a right to rely somewhat on the acquaintance with the road which she might presume that he had. Accordingly we need not consider whether it can be said that Reed's conduct was, as a matter of law, negligent. Even if this were so, the plaintiff's own due care was for the jury."

Speaking to this question in *State v. Boston etc. R. Co.*, 80 Me. 430, 15 Atl. 36, it is said:

"The plaintiff's case is fortified by another consideration. He neither drove, nor, as far as appears, had any control of the team on which he was riding. It is reasonable to suppose that the owner carried him either for hire or gratuitously as a neighborly kindness. His position was not of the same degree of responsibility to the railroad as was that of the driver.

Apr. 1909]

Opinion Per Gose, J.

He was a comparatively passive party. Not that he had no duty to perform. He could have asked the driver to stop the team, or he could have left it. But it would be natural, even though his fears were excited, that he should defer to some extent to the experience and discretion of the driver who was in the control of his own team; and before he had time to assert his own judgment against the driver's, or perhaps fully appreciate the situation, the inevitable event was upon him. We think this fact has considerable force in the combination of circumstances which weigh against the charge of contributory negligence."

In *Louisville & N. R. Co. v. Molloy's Adm'x.*, 28 Ky. Law 1113, 91 S. W. 685, one Molloy hired one Oller, a liveryman, to take him to Brownsville with a team. Molloy was killed while the team was crossing a railroad track. At page 687 the court said:

"Oller was a common carrier of passengers, and Molloy was no more chargeable with his negligence than he would have been for the negligence of the motorman if riding on an electric car."

In *Carr v. Easton*, 142 Pa. St. 139, 21 Atl. 822, a woman was injured by the upsetting of a sleigh in which she was riding, caused by high embankments of snow and ice and by gutters on the track. At pages 143, 144 it is said:

"She was a woman, not shown to have any special knowledge of driving or horses or sleighs, who had trusted herself to the guidance of her brother-in-law and his friend; and we cannot say, as matter of law, that the danger was so apparent or so serious that she was called upon to exercise her own judgment in opposition to theirs. All these matters are for the jury to decide, upon their view of reasonable care and prudent conduct, under the circumstances shown by the evidence."

See, also, *Louisville etc. R. Co. v. Creek*, 130 Ind. 139, 29 N. E. 481, 14 L. R. A. 733; *Board of Com'rs of Boone County v. Mutchler*, 137 Ind. 140, 36 N. E. 534; *Lake Shore etc. R. Co. v. McIntosh*, 140 Ind. 261, 38 N. E. 476; *Cunningham v. Thief River Falls*, 84 Minn. 21, 86 N. W.

763; *Denis v. Lewiston etc. R. Co.* (Me.), 70 Atl. 1047; *Roedler v. Chicago etc. R. Co.*, 129 Wis. 270, 109 N. W. 88; *Galveston etc. R. Co. v. Kutac*, 72 Texas 643, 11 S. W. 127.

The applicable rule was very clearly stated to the jury by the learned trial judge in the following terms:

"Now, briefly, you are to understand from these general charges that the husband of the plaintiff would not be liable for the negligence of the automobile driver if there was any, unless by his own failure to exercise ordinary care at the time he contributed to his injury by doing or failing to do something that he ought to have done or should not have done at the time as an ordinarily prudent person."

It would certainly be an extreme case where the court would be warranted in announcing, as a rule of law, that a passenger in an automobile was required to warn, advise, or direct its driver, or to apply to such passenger the doctrine of "stop, look and listen." We are impressed with the statement of the learned counsel of the respondent, that ordinarily the only obligation on such passenger is to "sit tight."

There is abundant evidence tending to show that the appellant was running at a dangerous speed, much in excess of the speed limit prescribed by ordinance. Speaking upon this question, we said, in *Engelker v. Seattle Elec. Co.*, 50 Wash. 196, 96 Pac. 1039:

"To the doctrine that exceeding the lawful speed limit constitutes negligence, this court has already subscribed in the *Traver* case [*Traver v. Spokane Street R. Co.*, 25 Wash. 225, 65 Pac. 284]. . . . We prefer to adhere to the doctrine that a thing which is done in violation of positive law is in itself negligence."

We have no difficulty in arriving at the conclusion that there was abundant evidence to be submitted to the jury upon all the questions raised by the appellant. The verdict being for \$2,500 was singularly modest, and the judgment will be affirmed.

FULLERTON, DUNBAR, MOUNT, CROW, and CHADWICK, JJ.,
concur.

Apr. 1909]

Opinion Per CHADWICK, J.

[No. 7782. Decided April 12, 1909.]

THE STATE OF WASHINGTON, *on the Relation of Otto A. Case,*
Respondent, v. GOVERNOR ALBERT E. MEAD et al.,
*Appellants.*¹

CERTIORARI—WHEN LIES—CESSATION OF CONTROVERSY—EXECUTED COURT MARTIAL. Certiorari does not lie to review a sentence of a court martial reprimanding the relator, after the reprimand has been administered, the court dissolved, and the sentence fully executed, the relator not being deprived of any dignity or rank; as the controversy has ceased to exist.

Appeal from a judgment of the superior court for King county, Frater, J., entered June 18, 1908, upon findings in favor of the relator, annulling the sentence of a court martial, after refusing to quash a writ of certiorari to review the same. Reversed.

John D. Atkinson, Attorney General, and Wm. E. McClure, Assistant, for appellants.

Will H. Thompson and Reeves Aylmore, for respondent.

CHADWICK, J.—Otto A. Case, with the rank of Major in the state militia, was charged with conduct unbecoming an officer, in that he gave out an interview to the Seattle Post-Intelligencer, a daily newspaper of general circulation in the state of Washington and elsewhere, criticizing the armory board, organized under the act of 1903 (Laws 1903, p. 209) for the purpose of superintending the construction of an armory in the city of Seattle. A court martial was organized at Seattle, and after a plea to the jurisdiction had been overruled, Major Case answered, admitting the interview, but protesting his innocence in that he had spoken as a civilian in the exercise of the right of free expression guaranteed to every citizen; that he was not engaged in military

¹Reported in 100 Pac. 1033.

duty or service at the time the words were spoken, and that the armory board, being made up in part of civilians, was not a military board the criticism of which would invite the discipline of the National Guard to which he owed allegiance. Major Case was found guilty by the court martial, with a recommendation that he be reprimanded. The findings of the board were approved by the Governor, who is ex-officio Commander-in-chief of the National Guard, and the sentence was executed. Thereafter Major Case sued out a writ of review in the superior court of King county, which the court refused to quash upon motion, and from an order annulling the sentence of the court martial, an appeal is prosecuted to this court.

The motion to quash the writ was made upon several grounds, the only ones now pertinent being as follows:

"(2) That the remedy sought to be obtained by said writ has become unavailing in that the said plaintiff was found by said court martial guilty of each of said specifications, and of said charge, and was sentenced to be reprimanded; that the said sentence has been approved by the Commander-in-chief of the National Guard of Washington, and has been fully executed and carried into effect, and the said plaintiff has been restored to duty as Senior Major of the Second Infantry Regiment, National Guard of Washington, without loss of rank or grade, or the infliction of any punishment or penalty whatsoever, except by such reprimand, and that said findings and sentence were approved and carried into effect prior to the institution of the above entitled proceeding, and prior to the issuance of the writ of *certiorari* by this honorable court.

"(3) That said court martial having fully discharged the duties has been dissolved, and that the officers composing same have returned to their respective homes, and that no matter or thing whatsoever now remains to be done by any of the defendants above named in regard to said court martial, and that the proceedings of said court martial have been fully and completely closed, and that plaintiff herein now occupies and has occupied since prior to the institution of the above entitled proceeding, in the National Guard of Wash-

Apr. 1909]

Opinion Per CHADWICK, J.

ington, the identical grade and rank held by him prior to the issuance of the order convening said court martial."

It is the judgment of this court that the motion to quash should have been sustained. However unwarranted the findings of the court martial and the reprimand inflicted upon Major Case may have been, the board being dissolved and the sentence executed, there is nothing of which a court can take notice and keep within its jurisdiction. A writ of review presupposes that if an error shall have been made by an inferior court or tribunal, a reviewing court can adjudge a correction of the error, and that the matter before it shall proceed to final determination in accordance with the forms of law. Major Case has been deprived of no dignity or rank by the Governor, who is Commander-in-chief, or the Adjutant General, who executed the sentence. Hence, this court cannot, as in some of the cases cited by the respondent, direct a restoration of something that was his and that he is still entitled to enjoy. The reprimand has been given and received. It is done. It is not such a material thing as a court can recall and in its stead direct an exoneration by the commanding officer of the National Guard. The board had performed its office and been dissolved when the writ was issued. Therefore no court could recall it into being to correct the error, if we should find upon a review of the whole evidence that an error had been committed. Therefore the finding of the court below:

"That all and every of the acts, proceedings, findings and sentence of the said court-martial were irregularly done and made, and without jurisdiction of said court-martial to do or make and the approval and execution thereof were irregularly made and entered in said proceedings, and in all matters and things the said court-martial and the said defendants, and each of them, proceeded irregularly, not in accordance with law, and without jurisdiction to act or proceed, and were null and void and should be set aside, vacated and held for naught;"

was improper to be entered, whatever the fact of guilt or innocence may have been, for the subject-matter upon which the judgment of the court must operate had ceased to exist.

There is, so far as we know, no authority which would warrant a writ to issue for the purpose merely of giving a court an opportunity to determine an abstract question of right and wrong. Counsel for respondent cites the following cases: *People ex rel. Spahn v. Townsend*, 10 Abb. New Cases 169; *People ex rel. Garling v. Van Allen*, 55 N. Y. 31; *People ex rel. Ely v. Porter*, 50 Hun. 161; to which may be added: *People ex rel. Skinnel v. Rand*, 41 Hun. 529, and *Durham v. United States*, 4 Haywood (Tenn.) 54. The New York cases hold that courts will inquire in such cases whether there was any evidence to sustain the findings of the military court, a question we do not feel called upon to decide; but in all of the cases just cited there was some right of person or property to protect or conserve. The relator had suffered the loss of rank or dignity, or had been fined. Hence, they are not in point.

The principle here involved was before the court in the case of "*Contested Election of Brigadier General*," 1 Strobh. Law (S. C.) 190. From the returns of the election for Brigadier General of the 8th brigade of the State Militia, it appeared that Col. James M. Commander had received a majority of thirty votes over his opponent, Col. H. G. Rich. The election was contested by Col. Rich. Major General Harlee called a board of officers, as provided in the militia laws of South Carolina, to try the protest. The board found for the contestant, and recommended a new election. This recommendation was finally approved by the Major General. An appeal to the Commander-in-chief availing him nothing, he applied to the courts for a writ of mandamus to General Harlee commanding him to issue the commission to which he believed himself to be entitled, or a writ of prohibition to prevent another election, or a writ of *certiorari* to compel the board of officers to certify their proceedings to the court for

Apr. 1909]

Opinion Per CHADWICK, J.

review. The trial judge held with reference to the writ of *certiorari*:

"Nor do I think the writ of *certiorari* can be granted. The board of officers has performed its functions, and is dissolved. The writ can hardly be addressed to the Major General; indeed I do not think that the writ of *certiorari* can ever issue to a military tribunal."

Upon appeal from an order denying the several writs, the appellate court said:

"The court of inquiry is to the army or militia, what the grand jury is to the Court of General Sessions of the peace. It goes before trial, and is intended merely to prepare the way to ascertain the truth. Under the former militia laws, the trial of contested elections was by officers, then called a court of inquiry. The Act of 1841 very properly rejected that name, and called those assembling to try such a case, a board of officers. These views would end all pretense of appeal to the Commander-in-chief; but they are much strengthened when it is recollected that their decision affects neither the rank nor commission of an officer, for notwithstanding this decision, Col. Commander *is an officer*, is in all respects the same as he was before it. *He still is a Colonel.* . . . The absence of all precedent of a writ of *certiorari* directed to a military court, is certainly a strong argument against its allowance now. But the very fact that the sentence of the court is not known until approved, then that the court is dissolved, and that the whole proceedings are in the possession of the officer ordering the court, show that the writ of *certiorari* cannot be awarded. For there is no one to whom it can go, and who can, as of and for the court, certify the proceedings. But that the Court of Sessions has no right to pronounce a military judgment upon the proceedings being certified up, is itself conclusive against the writ."

To the same effect is the case of *Ex parte Dunbar*, 14 Mass. 393.

It was the right of any officer of the guard to make the charges, however unfounded in fact, and being made, it was the duty of the court organized for the purpose to hear them. It had full jurisdiction. Nor was jurisdiction lost because

the reprimand was published without notice. However unfounded the finding of the court martial may have been, it was made and the sentence executed in strict compliance with the Military Code of the state of Washington, and no appeal to the Commander-in-chief was taken as therein prescribed. The sentence having been executed, the relator is without remedy by *certiorari*. His vindication might have been sought by appeal under the Military Code to the Commander-in-chief; or, that having been allowed to pass, he must, if he cares to pursue his remedies, seek redress in a civil action. The controversy having, so far as the law is concerned, ceased to exist, the case falls within that line of decisions wherein this court has declared that it will not retain jurisdiction to decide purely academic questions. They are collected and cited in *Mackay v. Dever*, 49 Wash. 489, 95 Pac. 860. It will be understood that we do not pass upon the merits of the controversy as presented in the record.

The judgment of the lower court is reversed, with directions to quash the writ of review in accordance with the motion of the appellants.

GOSE, FULLERTON, CROW, and MOUNT, JJ., concur.

DUNBAR, MORRIS, and PARKER, JJ., took no part.

Apr. 1909]

Opinion Per CHADWICK, J.

[No. 7825. Decided April 12, 1909.]

In the Matter of the Estate of ALFRED ADLER, Deceased.
LOUIS ADLER et al., Appellants, v. HANNAH ADLER,
*Respondent.*¹

WILLS—IMPLIED REVOCATION—SUBSEQUENT MARRIAGE OF TESTATOR—PROVISION IN WILL FOR FUTURE WIFE—STATUTES—CONSTRUCTION. Under Bal. Code, § 4598, providing that marriage revokes a former will of the testator if the wife be living at the time of his death, unless she shall be provided for in the will or in such way mentioned as to show an intention not to make such provision, marriage does not revoke a former will making a bequest in favor of the person who became the wife of the testator, where there was nothing in the will to show a counter intent; revocation of wills by implication not being favored.

Appeal from a judgment of the superior court for King county, Morris, J., entered November 23, 1908, in probate, granting letters of administration, upon denying a petition for the probate of a will, after a hearing on the merits before the court without a jury. Reversed.

Godman & Embree, for appellants.

McClure & McClure (*Edwin C. Ewing*, of counsel), for respondent.

CHADWICK, J.—On June 30, 1905, Alfred Adler, then a resident of the state of New York, made his last will and testament. The will disposed of his entire estate, estimated in value to be about \$250,000. He died September 16, 1907, in New York, leaving property in that state, and in King county, Washington. Among other bequests made by the testator, was the following:

“Seventh:—I give and bequeath to my friend, Hannah Harttung, at present residing at No. One Hundred Four West Eighty-fifth street, in the Borough of Manhattan, City and State of New York, the sum of Thirty-five Thou-

¹Reported in 100 Pac. 1019.

sand Dollars (\$35,000), free and clear of any inheritance or transfer tax thereon, absolutely, which legacy I direct shall be paid to her within four months after my death. It is my wish that the said Hannah Harttung shall consult with and accept the advice of my friend, Jacob M. Frank, in the investment of this sum of money so that the same may be safely and properly invested, and I urge her to use the income and not the principal, unless the use of some of the principal should become absolutely necessary, but my wishes and advice herein expressed are not mandatory and shall not in any manner affect the absolute character of the bequest herein made to her. In case of the death of the said Hannah Harttung before me, said bequest shall lapse, and in that event, and not otherwise, I give to her sister, Dorris Harttung, the sum of ten thousand dollars (\$10,000), free and clear of any inheritance or transfer tax or charge thereof. I direct my executors in either event to pay the transfer or inheritance taxes above referred to in addition to the bequest in this paragraph made."

A few hours before his demise, Alfred Adler married Hannah Harttung. The will was thereafter admitted to probate by order of the surrogate's court of New York county, New York; and pending proceedings therein, Hannah Adler, the respondent, was paid a legacy of \$35,000, and as the widow of the testator has received her dower interest in the real property of the testator in the state of New York. On June 4, 1908, respondent filed her petition in the superior court of King county, praying that letters of administration upon the estate of her deceased husband be issued to some disinterested person, resident in the state of Washington. In her petition she set up the making of the will theretofore admitted to probate in the state of New York, the marriage of the testator to the respondent subsequent to its execution, the consequent revocation of the will by the marriage and the intestacy of the deceased as to his estate in the state of Washington. Thereafter appellant Benjamin Lichtenberg filed a petition in the same court, setting up the will and its probate in the state of New York, and praying that it be admitted to probate, and that letters of administration

Apr. 1909]

Opinion Per CHADWICK, J.

with the will annexed be issued to him as the nominee of the executors of the will. This petition was afterwards supplemented by the petition of Louis Adler and Max Adler, brothers of the deceased, praying that the petition of appellant Lichtenberg be granted. Issues were drawn between the parties, and after trial the court rendered its decision, holding that the legacy given by the deceased to Hannah Harttung, now Hannah Adler, was given to her because of friendship existing between them, and was not given in contemplation of marriage; that the will was, by virtue of the marriage, revoked as to all property in the state of Washington. The prayer of respondent's petition was granted, and E. E. Morris was appointed a general administrator of the estate. From this order Benjamin Lichtenberg, Louis Adler, and Max Adler have appealed.

Counsel have prepared elaborate briefs in which they have traced the law on the subject of implied revocation of wills from the civil law down through the common law and through the various judicial interpretations put upon statutes as we find them construed in the text of reported cases. In the case of *In re Pettridge's Will*, 47 Wash. 77, 91 Pac. 634, will be found a recitation of the history of legislation upon the subject of revocation of wills by marriage, as it has occurred in this state. In that case we held that the will of a woman who had married after executing a will was revoked by the marriage, and the husband by reason of his heirship under the general rules of descent, was entitled to letters of administration and to his distributive share of the estate. In that case the will was made without mention of the person who thereafter became the husband of the deceased. The statute, Bal. Code, § 4598 (P. C. § 2344), upon which this case depends, was construed to the extent of holding that the word "testator" should be read "testatrix," in the event that a will had been executed by a woman under like circumstances as provided in the statute.

It was the rule at common law that, if one having sufficient

capacity made his will and thereafter married, the will was not revoked unless issue was born to the union. This rule was based on the theory that no reason existed for revocation as to the wife, for she was fully protected by her right of dower; whereas children born of the marriage took as heirs, and would be protected in the rights incident to heirship, unless the intent of the testator to exclude them was clearly shown by the will itself. With the abolition of dower and tenancy by the courtesy in many of the states of the Union, the reason of the rule failed and courts began to apply the reason rather than the letter of the law; and a line of authority, which may not improperly be called the common law in America, holding that the wife having no dower interest and being under the statute of descent an heir to the husband, came within the rule of the common law which revoked the will as to issue, and for the like reasons the will was held to be revoked by marriage. Precedent to any judicial interpretation, some states have, by legislative enactment, anticipated the possibility of confusion, and enacted laws fixing conditions the concurrence of which operates as a revocation of the will.

Many decisions based upon the common law, or upon statutes declaring, modifying, and enlarging the common law rule, have been cited. From them may be gleaned the following principles: (1) That the will is revoked by subsequent marriage; (2) that the will is revoked in the event of subsequent marriage and issue born; (3) that the will is revoked in the event of subsequent marriage unless it clearly appears from the will itself that the intention of the testator was otherwise; (4) that the will is revoked unless provision be made for the wife; (5) that the will is revoked unless it appears on the face of the will that the provision for the wife was in fact made in contemplation of marriage. These principles have been applied in one way or another in the following cases: *Brush v. Wilkins*, 4 Johns. Ch. 506; *Morgan v. Ireland*, 1 Idaho 786; *Brown v. Scherrer*, 5 Colo. App.

Apr. 1909]

Opinion Per CHADWICK, J.

255, 38 Pac. 427; *Edward's Appeal*, 47 Pa. St. 144; *Walker v. Hall*, 34 Pa. St. 483; *Deupree v. Deupree*, 45 Ga. 415; *Corker v. Corker*, 87 Cal. 643, 25 Pac. 922; *Byrd v. Surles*, 77 N. C. 435; *McAnnulty v. McAnnulty*, 120 Ill. 26, 11 N. E. 397, 60 Am. Rep. 552; *In re Toepfer's Estate*, 12 N. M. 372, 78 Pac. 53, 67 L. R. A. 315; *In re Larsen's Estate*, 18 S. D. 335, 100 N. W. 738; *Tyler v. Tyler*, 19 Ill. 151; *Ingersoll v. Hopkins*, 170 Mass. 401, 49 N. E. 623, 40 L. R. A. 191; *Duryea v. Duryea*, 85 Ill. 41; *American Board of Com'rs. v. Nelson*, 72 Ill. 564; *Ellis v. Darden*, 86 Ga. 368, 12 S. E. 652, 11 L. R. A. 51.

In a review of the cases, we find none based on a statute like our own with the fact concurring as we have it in the case at bar. Bal. Code, § 4598 (P. C. § 2344), is as follows:

"If, after making any will, the testator shall marry and the wife shall be living at the time of the death of the testator, such will shall be deemed revoked, unless provision shall have been made for her by marriage settlement, or unless she be provided for in the will, or in such way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut the presumption of revocation shall be received."

It will be seen by those who are inclined to follow the cases that our statute is a wide departure from the common law as well as from the theories usually advanced to sustain that rule, and that it differs from the statutes of any other state, at least in so far as they have been construed by the courts. As, for instance, the case of *Ingersoll v. Hopkins*; the testator left a legacy to one Mary Alice Peyton, whom he afterwards married, and having died without changing his will, the court held that, inasmuch as there was nothing in the will to indicate that it was made in contemplation of marriage, the will was revoked. The decision could not have been otherwise, for it was controlled by a statutory provision which is as follows:

"The marriage of any person shall act as a revocation of any will made by such person previous to such marriage, un-

less it shall appear from the will itself that the will was made in contemplation of such marriage;”

a requirement wholly lacking in our statute. It can hardly be contended—in fact it is not contended—that the words “marriage settlement,” occurring in our law, can be construed as synonymous with, or dependent upon, the same kind of proof as the words “in contemplation of marriage.”

The case next in order of seeming relevancy to our present inquiry is the case of *Duryea v. Duryea*. In its facts it is essentially on all fours with the case at bar. The testator made his will in which he provided for a legacy of \$10,000 to one Mary Peters, whom he afterwards married. He died, leaving property in the state of New York and, also, in the state of Illinois. His will was admitted to probate in New York, and after due course of administration in execution of the will, the legacy was paid to the legatee, then his widow. In passing, it is well to say that a will is not revoked under the law of New York by the subsequent marriage of the testator. An attempt was made to probate the will in Illinois. This proceeding was challenged by the widow, who had thereafter remarried, and the court held, following the older cases of *Tyler v. Tyler*, and *American Board of Com'rs. v. Nelson*, that the will was revoked in the state of Illinois. No statute intervened to perplex the judgment of the court in any of the Illinois cases. The only duty resting upon the court was to apply the common law rule, having in mind the changed condition, the abolishment of dower, and the statute making the wife an heir to the husband. The court held, as we think justly, as it had held in the *Tyler* case:

“We hold, that marriage under our statute making the wife heir to the husband and the husband heir to the wife, where there is no child or descendant of a child, is, in the absence of facts showing an intention to die testate arising subsequent to the marriage, a revocation of a will of the husband, made prior to the marriage, disposing of his entire estate without making provision in contemplation of the relations arising out of it.”

Apr. 1909]

Opinion Per CHADWICK, J.

While the pursuit of this review of the authorities is engaging to the writer, to extend it further would draw this opinion out to inordinate length. We shall therefore pass the remaining cases most relied on by the respondent—*In re Toepfer's Estate*, *Edward's Appeal*, *In re Larsen's Estate*, *Deupree v. Deupree*, and *Ellis v. Darden*—as well as all others hereinbefore referred to as falling within the common law rule, or within that rule as applied by courts to meet the changed rules of descent, or under the ban of a statute declaring a rule in derogation of the common law.

In so far, then, as we have gone, it would seem that we have made no real progress beyond distinguishing the cases upon which respondent has placed her dependence. Like other courts having a situation to meet not contemplated by the common law, but resulting from the duty of the court to give effect to every expression of the legislative will upon the subject, we have to meet, not alone the statute making the heirship of the husband and wife mutual, but also the expression "or unless she be provided for in the will," unaided by the bond "made in contemplation of marriage," or equivalent expression, to tie it to the current of authority. However dissimilar the conditions, the earlier English cases, as well as many of the American cases, are not devoid of phrase or reason to assist us in the true interpretation of the law. The case of *Kenebal v. Scrafton*, 2 East 530, although denied as authority by respondent, bears a peculiar relation to the expression "or unless she be provided for in the will," as found in our statute. The grounds upon which courts have been most inclined to rest the rule of implied revocation of wills is that, because of new moral or testamentary duties arising from a relationship not in contemplation at the time of the execution of the instrument, it will be presumed that the testator had annexed the tacit condition that it should not take effect if a change occurred in his situation that brought with it other objects upon which his bounty should in good conscience be bestowed. To recur to the case of

Kenebal v. Scrafton: One who was cohabiting with a woman made a will. In it he settled an annuity of 150 pounds upon her, and made provision for such children as he might thereafter have by her. Subject to these charges, he made another the residuary legatee of his whole estate. He then married the woman and had children by her. No mention or suggestion was made of marriage in the will. Lord Loughborough, to whom the case was first presented, 5 Vesey 688, finding some confusion in the settlement of the question, referred it for opinion to the court of King's Bench; and now, quoting the words of Chancellor Kent in the case of *Brush v. Wilkins*, 4 Johns. Ch. 506:

"The Court of K. B., after great consideration, decided, that the will was not revoked by the subsequent marriage and children, inasmuch as those new objects of duty were contemplated and duly provided for by the will. Lord Ellenborough, in delivering the opinion of the Court, declared the rule to be settled, that marriage and a child *without provision made for the objects of these relations*, operated a revocation of a will of lands; but that the rule only applied in cases where the wife and children were wholly unprovided for, and where there was an entire disposition of the whole estate, to their exclusion and prejudice. He approved of the ground of reason on which the doctrine of implied revocations was put by Lord Kenyon, and which was not a presumed alteration of intention, but a tacit condition annexed to the will when made, that it should not take effect, if there should be a total change in the situation of the testator's family. Here the wife and children were specifically contemplated and provided for, though under a different character and denomination."

The American cases as a rule have adopted the reasoning of Chancellor Kent, whether credited or not. Of the case of *Kenebal v. Scrafton*, counsel says:

"In that case Lord Ellenborough in delivering the opinion of the court, declared the common law of England to be that a will would be revoked by a subsequent marriage and birth of issue, provided there was a total want of provision for the family so newly circumstanced. In that case provision was

Apr. 1909]

Opinion Per CHADWICK, J.

by the will directly and distinctly made for the woman and for the children of the testator by her, and the court was apparently of the opinion that, inasmuch as provision was made for her and for the children, the revocation would not occur, although the will did not specifically provide for the marriage which afterward occurred. That this rule was found to work injustice is established by the fact that thirty-five years afterward the Act of I Victoria, Chap. 26, was passed, and by this act the law was changed so that, had the law in the time of Lord Ellenborough been as established by the statute, the will in question in *Kenebal v. Scrafton* would have been adjudged revoked by the marriage;”

a conclusion with which we will not quarrel.

But when counsel asks us to cure the defect, if it may be so called, in our statute, by a judicial decree, as Parliament by legislative expression changed the rule of the common law by providing that, “every will made by a man or woman shall be revoked by his or her marriage” (7 Wm. IV, 1 Vic. par. 28, ch. 26), we think we are asked to go beyond the constitutional limit of our authority. When the legislature has assumed to speak upon a given subject, courts must take its expression as it is, and if it be certain in its terms, there is no reason for speculation as to its reasons, nor warrant for adding anything to meet a given case. The provisions of Bal. Code, § 4598 (P. C. § 2344), are in the disjunctive. If a person shall have made a marriage settlement, or if the wife shall have been provided for, or if an intent not to make such provision is disclosed, the will is deemed revoked. It does not say that the provision must be made in contemplation of marriage. The only question open is whether the person who has become a proper object of the bounty of the testator is provided for. Nor will we take any concern of the amount of the provision. To bring ourselves within one of the several rules to which we have referred, we have no right to read into our statute the words “unless it clearly appears,” or “was made in contemplation of marriage.”

It is conceded that parol evidence is incompetent to explain the will. This furnishes further reason to sustain our

views. Taking the statute as it is, may we not say, presuming that the testator did not, at the time of executing the will, have in mind the changed condition to be wrought by a subsequent marriage, that, upon the happening of that event, being mindful of his will, he was satisfied with the provision he had made for respondent? Under the common law, and statutes in form different from our own, the law presumes a testator would have made another will; but under our statute the presumption should not follow, for the person in whose behalf the law was written is provided for, and the end of the law is fully accomplished. There is nothing in the will to show a counter intent. To hold otherwise it seems to us would be in effect to say that we should overturn this will because the legatee was not as fully provided for as in our judgment a wife should be, or has not received as much as she would have received under the statutes of descent. If we could do that, we might, in the interest of heirs in a given case, overturn the will because the person provided for had more than enough to meet the presumed duty of the testator. Said Chancellor Kent:

"It would be dangerous, and might lead to loose speculations, to give greater effect than the settled doctrine of the English law has already done, to the occurrence of new domestic duties. Every person is permitted to make his own will, at his discretion; and he may even disinherit his children, if he should be so inclined, whether they deserved, or not, such extreme chastisement. Every material addition to the property of a testator, or alteration in the circumstances of his family, varies his relations and duties, either in kind or degree, and might be made the ground of very plausible and pathetic claims upon the Court for the application of this doctrine of a presumed revocation. Courts would be running the hazard of substituting their will for that of the testator." *Brush v. Wilkins*, *supra*, page 518.

In thus disposing of this case, we can give effect to another most salutary rule. While we have said that in our judgment the grounds upon which wills are or may be revoked are statutory, it is also the rule that revocation of

Apr. 1909]

Opinion Per CHADWICK, J.

wills by implication of law are not favored. The reason for overturning a will must supplant every other consideration. Where wills have been held to be so revoked by implication, it was because of some reason so controlling that the presumption followed that the testator himself, upon the happening of the event, would not have published the document as his will. There is nothing in the will before us, and nothing is suggested in the statute, that would warrant the indulgence of this presumption on our part. Speaking to this subject, the supreme court of Vermont has said:

"The statute of this state respecting revocations of wills and testaments, under which this question must be decided, is a literal transcript of the sixth section of the 29 Charles II. The construction of this clause of the statute, in England, has been that it leaves revocations by conclusion and operation of the law in the same state in which it found them. This construction obviously renders the important provisions of the section, in relation to revocations, altogether nugatory, except as to a particular mode of affecting an express revocation; whereas, the plain sense of the statute is that no revocation, except such as reverts *ex necessitate rei*, shall be effected otherwise than expressly, and that, too, in one of the modes therein pointed out. I am not prepared to go the length of the English decisions as reported on this subject. I feel bound to construe every constitutional act of the legislature in such manner as to give it full and complete effect. For certainly the constitutional statutes of this state are not to be annulled on the authority of any court. I cannot admit that an alteration in the circumstances of the deviser will, in any case, amount to a revocation in law, or that an intended alteration in his estate will have that effect. It is time that the intention of the testator is to be principally regarded, but that intention is to be inferred from such facts only as the statute authorizes us to notice." *Graves v. Sheldon*, 2 D. Chipman (Vt.) 71, 15 Am. Dec. 653.

Our conclusion then is that the words "or unless she be provided for in the will," being in the disjunctive and in no way qualified by the usual term "in contemplation of marriage," refer to a condition existing at the time of death,

and not necessarily to an intended wife. A person being provided for may, by intermarriage with the testator, bring herself within the operation of the statute. If she be provided for in the will, as she is in the case at bar, she comes within our statute, as under the rules to which we have referred she would have fallen without it. Alfred Adler having made his will, and afterwards married, his wife surviving him, at least one of three things must appear: He must have made a marriage settlement, or she must be provided for in the will, or so mentioned as to indicate his intention not to make such provision. The statute must be construed to read as follows:

"If after making any will the testator shall marry and the wife shall be living at the time of the death of the testator, such will shall be deemed revoked . . . unless she be provided for in the will. . . ."

Hannah Adler is provided for in the will, and is concluded by its terms.

This case is reversed, with directions to the lower court to admit the will to probate, to take an account of the administration, and to direct the settlement of the estate by an administrator with the will annexed, as prayed for in the petition of appellant Lichtenberg.

FULLERTON, GOSE, CROW, and MOUNT, JJ., concur.

MORRIS, PARKER, and DUNBAR, JJ., took no part.

Apr. 1909]

Opinion Per CHADWICK, J.

[No. 7958. Decided April 13, 1909.]

MARIA MASOERO, *Appellant*, v. J. A. CAMPBELL & COMPANY
et al., *Respondents*.¹

APPEAL—ORDERS APPEALABLE—DENYING TEMPORARY INJUNCTION—INSOLVENCY. Under Bal. Code, § 6500, an order denying a temporary injunction is not appealable unless the court has found the party against whom it is sought to be insolvent, although the court attempted to fix the amount of a supersedeas bond; nor could the denial be considered a final determination as to the sufficiency of the complaint where the record fails to show that a demurrer thereto was passed upon.

Motion to dismiss an appeal from a judgment of the superior court for King county, Morris, J., entered March 6, 1909, denying plaintiff's application for a temporary restraining order. Appeal dismissed.

McBurney & Cummings, for appellant.

Walter A. Keene (*Hastings & Stedman*, of counsel), for respondents.

CHADWICK, J.—It appears that appellant brought an action in the court below wherein she sought and obtained a temporary restraining order, which was set for hearing on a day fixed by the court. At the time of hearing, a demurrer was sustained to her complaint; whereupon she asked and obtained leave to file an amended complaint. On February 26, 1909, the minutes of the court show the following proceedings were had:

“Feb. 26.

“Plaintiff's application for temporary injunction is denied. Exception allowed. Supersedeas bond is fixed in the sum of \$1,000.”

From the order denying plaintiff's application for a temporary injunction, an appeal was taken.

Respondents move to dismiss the appeal. One of the

¹Reported in 100 Pac. 1024.

grounds urged in support of this motion is that an order denying an application for a temporary injunction is not appealable unless the court has found the party against whom it is sought to be insolvent. That part of Bal. Code, § 6500, referring to this subject is as follows:

"From an order granting or denying a motion for a temporary injunction, heard upon notice to the adverse party, and from any order vacating or refusing to vacate a temporary injunction: *Provided*, That no appeals shall be allowed from any order denying a motion for a temporary injunction, or vacating a temporary injunction unless the judge of the superior court shall have found, upon the hearing, that the party against whom the injunction was sought was insolvent."

Appellant seeks to avoid the force of this statute by suggesting that the order of the court did, also, in effect dissolve the temporary restraining order theretofore issued, and that the order of the court was a determination of the rights of the parties; and for these reasons subd. 3, which we have quoted, is in conflict with subd. 6 of § 6500, which reads as follows:

"From any order affecting a substantial right in a civil action or proceeding, which either (1) in effect determines the action or proceeding and prevents a final judgment therein; or (2) discontinues the action; or (3) grants a new trial; or (4) sets aside or refuses to affirm an award of arbitrators, or refers the cause back to them;"

and that the latter subdivision must control the former. The record does not show that the court has ever passed upon the demurrer to the amended complaint. We conceive, therefore, that the only question before us is whether or not an appeal will lie from an order denying a temporary injunction, without the finding of insolvency. We are unable to construe the subdivisions of § 6500 quoted as in any way conflicting. Nor do we understand the order of the court to be a final determination of the action. Counsel says:

"Denial of appellant's motion was based entirely upon the sufficiency of the complaint, and what the court in effect did

Apr. 1909]

Opinion Per CHADWICK, J.

was to sustain respondents' demurrer. Had the court done so formally, there would be no question in this case as to the appellant's right of appeal from that order. It is our contention, however, that the effect of the court's ruling was to sustain the demurrer of the respondents. For that reason this case falls squarely within the rule laid down by this court in *Peters v. Lewis*, 28 Wash. 366, where the court used the following language:

"Respondents move to dismiss the appeal on the alleged ground that this is an appeal from an order denying a temporary injunction, and that under the authority of *Colby v. Spokane*, 12 Wash. 690, 42 Pac. 112, it is not an appealable order, since no finding was made that respondents are insolvent. We think, however, that the appeal should be treated as one from a judgment on an order sustaining a demurrer to the complaint, plaintiff having declined to plead further. It appears from the record that the court determined the whole matter upon what was deemed to be the insufficiency of the complaint, and, since appellant saw fit not to plead further, there was no further hearing open to him in the case, and the judgment became final and appealable. The motion to dismiss the appeal is denied."

It will be seen that the appeal in that case was prosecuted from a final judgment, and that the denial of the temporary injunction was a mere incident, a condition not disclosed by the record before us; for, as we have said, the court did not pass upon the sufficiency of the amended complaint. So far as the record shows, the case is still to be determined on its merits. The fact that the court continued the restraining order pending the appeal, and fixed a bond of \$1,000, would not affect our conclusion. The restraining order was dissolved as a matter of law at the time of hearing the application for the temporary injunction. (*State ex rel. Müller v. Lichtenberg*, 4 Wash. 407, 30 Pac. 716), and the act of the court in this behalf was in legal effect no more than an attempt to fix a supersedeas. We think this case falls squarely within the well-settled rule of this court, as announced in the following cases: *Colby v. Spokane*, 12 Wash. 690, 42 Pac. 112; *Anderson v. McGregor*, 36 Wash. 124, 78 Pac. 776;

State ex rel. Young v. Superior Court, 43 Wash. 34, 85 Pac. 989.

Believing the motion to be well taken for the reasons herein expressed, the appeal is dismissed.

FULLERTON, MOUNT, CROW, DUNBAR, GOSE, and PARKER, JJ., concur.

MORRIS, J., took no part.

[No. 7460. Decided April 13, 1909.]

**R. S. NORRIS *et al.*, Respondents, v. CHINA TRADERS'
INSURANCE COMPANY, LIMITED, Appellant.¹**

INSURANCE—MARINE INSURANCE—POLICY—MODIFICATION BY PAROL—AUTHORITY OF AGENTS—EVIDENCE—QUESTION FOR JURY. A policy of marine insurance restricting the vessel to navigation in certain waters may be modified by parol by general agents having authority to write insurance, fix rates, collect premiums and adjust losses, where the policy did not require modifications to be in writing; and there was sufficient evidence to make a question for the jury where it appeared that such agents consented to a voyage to prohibited waters, stating that there would be additional premiums to be paid, which the agents collected after notice that the vessel was in the prohibited waters and before notice of the loss of the vessel.

SAME—PLEADING—ISSUES AND PROOF—REPLY SETTING OUT MODIFICATION OF POLICY. In an action upon a policy of marine insurance which had been modified by parol so as to permit a voyage to prohibited waters, it is proper for the plaintiff to allege the effect of the contract without setting it out, and upon an answer setting out parts of the policy and a breach by the voyage, to reply by setting out the original contract and the modification and waiver respecting the prohibited waters.

SAME—POLICY—PROHIBITED WATERS—WAIVER OF DEVIATION—GENERAL AGENTS. There is a waiver of restrictions in a marine policy respecting prohibited waters, where general agents made no objection to the fact that the insured vessel was in the prohibited waters, collected additional premiums therefor, stated that the vessel was insured, and received proofs of loss stating that the loss would undoubtedly be paid.

¹Reported in 100 Pac. 1025.

Apr. 1909]

Opinion Per MOUNT, J.

Appeal from a judgment of the superior court for King county, Griffin, J., entered February 3, 1908, upon the verdict of a jury rendered in favor of the plaintiffs, in an action upon a policy of marine insurance. Affirmed.

Kerr & McCord and Eugene E. Childe, for appellant.

William Martin and Julius L. Baldwin, for respondents.

MOUNT, J.—This action was brought to recover upon a contract of marine insurance. The complaint alleged a contract of insurance with the defendant, for the period of one year from June 5, 1905, in the sum of \$1,000, upon the gasoline steamer *Admiral*, against all loss and perils of the sea; that on October 8, 1905, without fault of the owners, the vessel was lost; that the plaintiffs complied with all the terms of the contract; and that the defendant neglected and refused to pay the amount of the insurance.

The defendant answered, admitting the execution of a policy of insurance for the sum of \$1,000 upon the vessel on the date named, and the loss of the vessel, and alleged that the policy contained the following stipulation:

"The insured in accepting this policy hereby binds himself or themselves according to the following agreements and stipulations: . . . 4. Not to use any ports or places on the east coasts of Asia north of Shanghai, nor islands adjacent thereto, except ports of Japan. . . . B. The insured vessel to be employed in navigating in Puget Sound, British Columbia and Alaskan waters. Permitted to use ports in places in Alaska not north of Kotzebue Sound, principally trading between Nome and Cape Prince of Wales;"

that the vessel deviated from the waters wherein she was insured, and was lost in prohibited waters, viz., at Whalen, in the Arctic Ocean, on the north coast of Siberia, and therefore that there is no liability under the policy. Other defenses were also alleged in the answer, but they are not now insisted upon. The reply admitted the provision above quoted in the original policy, but alleged a subsequent modification and waiver thereof, to the effect that the vessel might

make a voyage to some point in Siberia; that the vessel was lost in waters not prohibited. The case was tried to the court and a jury, verdict was returned in favor of plaintiffs for the amount of the policy, and judgment was entered thereon. The defendant appeals from that judgment.

Several errors are assigned, but they are all presented under three heads, as follows: (1) That there were no facts proven sufficient to sustain the verdict; (2) that the court erred in admitting evidence of an oral authority from the agents of appellant, permitting a voyage to Siberia; and (3) that the court erred in directing the jury to the effect that, if they found that the appellant had made an oral agreement waiving the limitation contained in the written policy without additional premium, a verdict might be returned in favor of the respondents.

The facts are as follows: The respondents were the owners of the gasoline vessel Admiral. On June 5, 1905, the appellant executed a policy of marine insurance in the sum of \$1,000, insuring the vessel against loss for the period of one year from that date. This policy contained the provisions above quoted, restricting her to the navigation of certain waters. The policy was issued by J. M. E. Atkinson & Co., of Seattle, who were general agents of the appellant, authorized to write policies, fix rates, collect the premiums, and make settlement for losses. About the time the policy was written, the vessel left Seattle for Nome, Alaska. She made several trips between Nome and Cape York, on the western coast of Alaska.

Some time in the latter part of August, 1905, the owners desired to send the vessel with a cargo to some point across Bering Strait, on the coast of Siberia. They did not at that time know the exact destination. One of the owners went to the general agents of appellant who had issued the policy, and stated that they desired to send the vessel over to Siberia, and inquired if she would be covered by insurance. He was informed by the general agent that the vessel would be cov-

Apr. 1909]

Opinion Per MOUNT, J.

ered by insurance. The agent, however, testified that such a conversation took place, but that he stated there would be a small additional premium, depending on the ports the boat might make. The respondents paid no additional premium, but relied upon the belief that the vessel was, or would be, insured for the Siberian waters. Thereafter, on September 10, the vessel cleared from the port of Nome, laden with a cargo of merchandise consigned to one Petrof Orloff, at Chaun Bay, in Siberia, a bay about four hundred and eight miles from Nome, on the north coast of Siberia.

The vessel proceeded on her voyage, and arrived off East Cape, Siberia, on September 11, 1905. She proceeded westward along the north coast of Siberia until she arrived at Cape Shelagin, the entrance to Koliuchin Bay, where she cast anchor and remained five days. Encountering floating ice and heavy seas, she turned back to Nome, and proceeded on her return voyage easterly along the Siberian coast until October 6, 1905, when she cast anchor off East Cape Village, Siberia. The wind becoming adverse, she was removed to Whalen, on the north side of East Cape. While lying there, the engineer disappeared, or was lost, and no one on board could start the gasoline engine. On the morning of October 8, 1905, a strong wind sprung up and drove the vessel on shore, and she was totally lost, together with her cargo. The crew of the vessel was saved, but was compelled to spend the winter with the natives at that place.

In the meantime, Mr. Norris, one of the owners, reported the voyage to the agency of appellant at Seattle, and also the absence of the vessel, and was informed that the vessel was covered by insurance. Subsequently, in November and December, 1905, and on April 20, 1906, Mr. Norris paid the premiums due on those dates, after it was known that the vessel was within Siberian waters. Afterwards, when the crew returned, the loss was reported and proofs of loss were made to the insurance company, but payment of the policy was subsequently refused upon the ground that the vessel, by

the terms of the policy, was not permitted to sail in Siberian waters.

We have no doubt that the vessel at the time she was lost was outside of the waters designated in the written contract, and the rule of law is that, where a vessel is insured to navigate in certain waters and makes a voyage outside of those waters without permission of the underwriters, such voyage is a deviation, and for a loss accruing while the vessel is making such deviation, no recovery can be had upon the policy. But the claim made here is that the written contract was, subsequent to its execution and prior to the loss, modified so as to permit the voyage upon which the vessel was lost. There was evidence to the effect that the agents of appellant authorized the modification. It is not claimed that the agents had no authority to do so. They were general agents, with general authority to write insurance, fix rates, collect premiums, and adjust losses. They appear to have had full and complete authority in the matter. While the agents denied that any deviation was permitted, there was, we think, ample evidence to go to the jury upon that point. There was evidence to the effect that it is the rule to attach written slips to a policy showing any changes agreed upon, and that it was customary to charge an increased rate for such changes, and especially where the voyage extends to several ports. There is no provision, however, in the policy that any modification thereof must be in writing, and there is no statute in this state providing that contracts of this character must be in writing. The general rule is that, "A policy may be altered or modified by the consent of both parties and subject to the same exceptions as in the case of other contracts, and the restrictions, if any, imposed by statute. The alteration and modification may be by parol agreement." 26 Cyc. 610; *Thompson v. Germania Fire Ins. Co.*, 45 Wash. 482, 88 Pac. 941; *Long v. Pierce County*, 22 Wash. 330, 61 Pac. 142. Under this rule, the parties were at liberty to alter the contract if they so desired. Whether they actually did so or

Apr. 1909]

Opinion Per MOUNT, J.

not, was a question of fact, and we think the evidence was amply sufficient to go to the jury upon that question.

The appellant objected to the introduction of any evidence tending to show modification of the written agreement, upon the ground that the action was based upon a written contract, and not upon a modified contract; and for the further reason that the modification claimed was an attempt to vary the terms of a written contract. While it is true that the action was based upon an alleged contract, the complaint did not set out the contract *in haec verba*, but alleged the effect of the agreement without setting it out. The answer set out certain parts of the policy, and alleged a breach of certain conditions. The reply thereupon admitted the making of the original contract, and then alleged a modification and waiver with reference to the prohibited waters. We think this was proper pleading and, under the rule above stated, that the contract could be proved by parol without being subject to the rule that it varied the terms of the written contract. The modification was a subsequent contract, and not a variation of the terms of the original written contract. The rule that parol evidence is not admissible to contradict or vary the terms of a written contract, does not apply to a subsequent modification or waiver of the terms of the written contract. *Viele v. Germania Ins. Co.*, 26 Iowa 9, 96 Am. Dec. 83, and cases there cited. We are satisfied that the appellant, by its general agents, even if it did not actually consent to a modification of the original contract, waived the provision limiting the waters in which the vessel should be permitted to navigate. This provision was for the benefit of the appellant, and it might waive it if it so desired. *Viele v. Germania Ins. Co.*, *supra*. After the agents knew that the vessel had gone into Siberian waters, they made no objection thereto; but thereafter received three payments of premium under the policy. They stated to the respondents that the vessel was covered by insurance. They received proofs of loss, and thereafter stated to respondents that they

had no doubt the loss would be settled. We think this clearly shows a waiver of the conditions of the policy. It was not necessary that the money consideration should be paid at the time.

What we have said above is conclusive of the questions presented upon the instructions. We find no error in the record, and the judgment must therefore be affirmed.

FULLERTON, MORRIS, GOSE, PARKER, DUNBAR, CROW, and CHADWICK, JJ., concur.

[No. 7606. Decided April 13, 1909.]

R. C. SMYTH, *Respondent*, v. LANCE & PETERS,
INCORPORATED *et al.*, *Appellants*.¹

APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence will not be reviewed on appeal where the trial judge was much better able to judge the evidence, and the supreme court cannot say that the evidence preponderates in favor of the appellant.

MECHANICS' LIENS—SUBCONTRACTOR—LIEN FOR SUMS PAID FOR LABOR. A person employed to do the plastering upon a building for the contractor, to be paid therefor the amount paid out to his men and a further sum for his own work and superintendence, is entitled to a lien for the amounts paid by him for the labor of his men, and for his own labor, according to the terms of the contract, although he did none of the actual work of the plastering, under Bal. Code, § 5900, giving a lien to any laborer for labor performed, and Bal. Code, § 5909 giving a lien to a contractor for any sum due on his contract after deducting claims of other parties for labor performed, and Bal. Code, § 5917, requiring the lien laws to be liberally construed.

Appeal from a judgment of the superior court for King county, Morris, J., entered April 13, 1908, upon findings in favor of the plaintiff, in an action to foreclose a mechanics' lien. Affirmed.

¹Reported in 100 Pac. 995.

Apr. 1909]

Opinion Per MOUNT, J.

John B. Van Dyke & T. F. Bevington, for appellant Lance & Peters.

Ira Bronson & D. B. Trefethen, for appellant Seattle Park Company.

Higgins, Hall & Halverstadt, for respondent.

MOUNT, J.—The plaintiff brought this action to foreclose a laborer's lien against the building known as the Natatorium, at Luna Park, located upon certain tide lands, in the city of Seattle. A decree was entered in favor of the plaintiff, and the defendants appeal.

The main question in the case is one of fact. The Seattle Park Company let a contract to appellant Lance & Peters, Inc., for the construction of the building. The latter employed the respondent to do the work of plastering. The respondent claims that his contract with Lance & Peters, Inc., was to the effect that he should furnish men and do the work, and that his pay should be the amount he paid the men, plus \$7 per day for himself, and ten per cent of the amount he paid the men; that the total amounted to \$1,288.10, and that he had been paid the sum of \$200 thereon; alleging a balance of \$1,088.10. The appellant Lance & Peters, Inc., claims that the respondent agreed to do the whole work for \$700; that he was paid \$200, and that it tendered the balance, \$500, before the action was brought. It is conceded that the contract was oral. The trial court, after seeing and hearing the witnesses, found the terms of the contract as claimed by the respondent. There is evidence to support each theory. The appellants claim that the preponderance of the evidence shows that the contract was for \$700, and we are asked to reverse the finding of the trial court against them upon that question. We have carefully read all the evidence, and are not satisfied to say that the evidence preponderates in favor of the appellants. This is a case where the trial court was much better able to judge the evidence than we

are, and for that reason we decline to reverse the findings of the trial court upon the question.

It is contended by the appellant Seattle Park Company that the respondent acted merely as a superintendent, and therefore is not entitled to a lien against the building for the amount paid to the men whom he employed. There is some evidence to the effect that respondent was to be paid "a reasonable amount for the supervision of the work," but we think the evidence, taken as a whole, fairly shows that respondent agreed to do the work; that he employed and paid his men; that while he did not do the actual work of plastering with his own hands, he assisted therein by erecting scaffolding and directing the work. In other words, the work was done by him by men whom he employed at his own expense. The statute provides: "Every person performing labor upon . . . any . . . building has a lien upon the same for the labor performed." Bal. Code, § 5900 (P. C. § 6102). "The contractor shall be entitled to recover upon the claim filed by him only such amount as may be due him according to the terms of his contract, after deducting all claims of other parties for labor performed." Bal. Code, § 5909 (P. C. § 6111). And: "The provisions of law relating to liens created by this chapter, and all proceedings thereunder, shall be liberally construed with a view to effect their objects." Bal. Code, § 5917 (P. C. § 6119).

In *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389, in construing these and other provisions of the statute relating to liens, we said, on page 341:

"The other sections of the statute which we have cited clearly indicate that a subcontractor or contractor is to be regarded as performing labor upon the building, and is entitled to file lien claims therefor the same as laborers and materialmen, but subordinate to such liens. Construing the act, as we must, so as to give effect to every part thereof, we must hold that the contractor has a lien for the contract price, irrespective of the fact that he performed no service

Apr. 1909]

Opinion Per MOUNT, J.

further than overseeing the construction of the building according to his contract."

Under a similar statute, in *Blumauer v. Clock*, 24 Wash. 596, 64 Pac. 844, 85 Am. St. 966, we held that, where one who had a contract to do certain work employed laborers to assist him, paying such laborers out of his own funds, where such hired labor in no wise changed the contract price or relations, such persons had a lien for such labor; and, also, to the same effect in *Robins v. Paulson*, 30 Wash. 459, 70 Pac. 1113, and *O'Connor v. Burnham*, 49 Wash. 443, 95 Pac. 1013. Under this rule the respondent was clearly entitled to a lien for work which was performed by himself and men employed and paid by him.

Some question is made by both appellants upon the amount the court found due, but the amount of the claim depends entirely upon the contract; and since the court found with the respondent upon that question, the amount claimed was settled by that finding, for there seems to be no dispute about the wages, or the number of days the men were engaged upon the work, or the amount of the credits.

We find no error in the record. The judgment must therefore be affirmed.

DUNBAR, CHADWICK, FULLERTON, CROW, GOSE, and PARKER, JJ., concur.

MORRIS, J., took no part.

[No. 7564. Decided April 18, 1909.]

NORTH SHORE BOOM & DRIVING COMPANY, *Appellant*, v.
NICOMEN BOOM COMPANY, *Respondent*.¹

LOGS AND LOGGING—BOOMS—UNLAWFUL MAINTENANCE—REPLEVIN—TITLE OF PLAINTIFF. A boom company that acquires possession of logs by the maintenance of a boom in violation of a decree of court is a trespasser and wrongdoer and cannot maintain replevin on the theory that defendant unlawfully opened plaintiff's boom; since in replevin the plaintiff must succeed, if at all, upon the strength of his own title.

APPEAL—DECISION—SUPERSEDEAS OF JUDGMENT OF SUPREME COURT ON APPEAL THEREFROM—UNITED STATES STATUTES—REQUIREMENTS. The judgment of the supreme court of this state is not superseded by the order of supersedeas signed by the Chief Justice on allowing a writ to the United States Supreme Court; since U. S. Rev. St. § 1007, further requires that service of the writ of error be made on the adverse party, and that the required bond be filed.

Appeal from a judgment of the superior court for Pacific county, Rice, J., entered February 18, 1908, upon findings in favor of the defendant, after a trial before the court without a jury, in an action of replevin. Affirmed.

Chas. E. Miller and *W. H. Abel*, for appellant.

W. W. Cotton, Welsh & Welsh, and *James G. Wilson*, for respondent.

DUNBAR, J.—This is an action in replevin, brought by the appellant against the respondent to recover possession of one hundred and eighty sawlogs, or about 360,000 feet. The complaint alleged, in brief, that on the 18th day of January, 1906, the plaintiff was in lawful possession of the property described as above; that the defendant on that day wrongfully and unlawfully and by force and violence took said property from the possession of plaintiff; that demand was made by the plaintiff; that the defendant unlawfully withholds; and judgment is demanded for the possession of the

¹Reported in 101 Pac. 48.

Apr. 1909]

Opinion Per DUNBAR, J.

said sawlogs, or \$1,500, their alleged value. The affidavit sets up the fact that the plaintiff was the owner of and maintained a certain boom in North river, in the county of Pacific, for the purpose of catching, sorting, rafting, and booming logs, etc.; that these logs described in the complaint were consigned to it for booming purposes, etc.

The answer is an extremely long one, denying certain paragraphs of the complaint, but admitting that defendant was in possession of the logs described; for an affirmative defense alleging that the defendant was a corporation, duly organized, and entitled under the law to catch, boom, sort, and raft logs, timber, etc., and setting forth a description of the land occupied by the boom which it had constructed and was entitled to operate; alleging that on the 4th day of September, 1903, the plaintiff unlawfully commenced the construction of a boom on the lands and waters which the defendant was entitled to occupy; that the defendant commenced an action in the superior court against the plaintiff to restrain it from erecting, maintaining, or operating the boom, etc.; that judgment was rendered in the superior court against the plaintiff in that case, the defendant in this; that, upon appeal to the supreme court, the judgment was reversed, and the cause remanded to the superior court with instructions to enter a judgment in accordance with the opinion handed down by the supreme court; that said judgment, in short, was to the effect that the land in controversy was properly used and maintained by the Nicomen Boom Company, the defendant in this action; and adjudged and decreed that the boom of the Nicomen Boom Company and that of the North Shore Boom & Driving Company could not exist together; that the North Shore Boom & Driving Company was unwarrantably interfering with the Nicomen Boom Company's location; and that in its booming operation the said North Shore Boom & Driving Company must be restricted to territory outside of the territory of the Nicomen Boom Company; that thereafter the judgment and decree and remittitur of the supreme court of

the state of Washington was sent down to the office of the clerk of the superior court of the state of Washington, and duly filed, and judgment was entered in accordance with the judgment rendered by the supreme court; that it was decreed that the North Shore Boom & Driving Company had no right whatsoever to erect, maintain, keep, or operate any boom on the Nicomen Boom Company's said location described in the judgment, and that it was forever enjoined, restrained, and prohibited from driving any timber of any kind upon the location which was occupied by the Nicomen Boom Company, for the purpose of booming or driving logs; that it was further adjudged that the North Shore Boom & Driving Company had no right to maintain or to operate that certain boom structure heretofore constructed by it on the aforesaid location of the Nicomen Boom Company; that it was further adjudged that the North Shore Boom & Driving Company be, and it was thereby, ordered, required, and directed to immediately open said boom and to immediately begin to take up and remove certain piling, timbers, boom, and other structures, and all other structures which it had theretofore erected and constructed on the Nicomen Boom Company's location in North river in Pacific county, Washington. The answer set up that, notwithstanding such judgment, the plaintiff had continued to boom logs, to the annoyance and detriment of the defendant; avers that on or about the 18th of January, 1906, defendant requested the plaintiff to open its said boom and permit the logs of plaintiff, and all other persons, which were in said boom to pass through, and that the plaintiff refused so to do; that thereupon the defendant did open said boom, and thereupon the logs which are described in the complaint came down into the boom of the defendant; that the defendant caught and held the said sawlogs and offered to assort, boom, and raft said sawlogs on the payment by the plaintiff of the lawful boomage charges, to wit, sixty cents per thousand feet, but that plaintiff refused to pay the defendant any boomage charges, and denied the

Apr. 1909]

Opinion Per DUNBAR, J.

right of defendant to catch in its boom, logs, etc.; alleging the number of logs in feet of timber in said booms. Judgment was demanded for the sum of \$216, the boomage price of the logs, and also an additional sum of \$500.

A reply put in issue many of the affirmative allegations of the complaint, and supplemental answer was filed which it is not necessary to review here. Exception was taken to the findings of fact by the court and certain findings are alleged as error here, but we are satisfied that the findings of the court were justified by the testimony in the case. Upon the trial of the cause, a judgment was entered in favor of the defendant for the sum of \$216 as prayed for. Appeal followed.

It is first contended by the appellant that a mere trespasser and wrongdoer can acquire no special property in an article the possession of which he has acquired by force and violence, by afterwards performing some service thereon, especially where such service is not only unnecessary, but rendered against the express protest of the owner; that at the time the logs in question were received by the respondent, they were in actual possession of the appellant, and it was not necessary to perform any work upon them. While, no doubt, this proposition of appellant in the abstract is true, yet the plaintiff in a replevin case must prove his right to the possession of the property demanded. It is not sufficient to show that the defendant is not entitled to the possession. The pertinent question is, whether the proof sustains the plaintiff's claim of right to possession; and, under the prior judgment of this court, the plaintiff in this action was the trespasser and wrongdoer. This court had, in the case of *Nicomén Boom Co. v. North Shore Boom & Driving Co.*, 40 Wash. 315, 82 Pac. 412, decided and decreed that the North Shore Boom & Driving Company, the appellant in this case, had no right to boom logs at the location at which it was operating its boom, which is the same location at which the logs in the present case were boomed. The plain mandate, entered by the

superior court in response to the judgment of this court, was for the North Shore Boom & Driving Company to immediately open its boom so that logs could pass through, and to forthwith commence to take up its boom structure. That being the case, and that judgment being *res adjudicata* between the parties to this action, the appellant was surely a trespasser and wrongdoer, and therefore had no right to the possession of the logs that floated out of its boom, whether through its action or the action of the respondent.

That the plaintiff in a replevin action must succeed on the strength of his own right to possession was decided by this court in *Harvey v. Ivory*, 35 Wash. 397, 77 Pac. 725, where the court, in discussing the question, said:

"But his right to possession is not thus absolute; it is conditional only, dependent on his ability to make good his title and right of possession, when these rights are called in question by the defendant. If he fails to make good his title or right of possession, the right of the defendant to have the property returned to him, or to have its value in case it cannot be returned, follows as a matter of course."

Applying this rule to the case in point, it becomes immaterial to the decision of the case whether the respondent had any lease or title to the property whatever. The North Shore Boom & Driving Company had none, and could have had no right to the possession of the logs, because the very maintenance of such possession was in violation of the decree of this court.

About the only other question that needs discussion is the contention of the appellant that the judgment of the court, in the case of *Nicomén Boom Co. v. North Shore Boom & Driving Co.*, was suspended by reason of an appeal having been taken from the judgment in that case to the supreme court of the United States. The lower court held that on the 18th, 19th, and 20th of January, 1906, said judgment was in full force and effect, and no appeal or writ or error had, up to that time, been taken from such judgment; and

Apr. 1909]

Opinion Per DUNBAR, J.

we think that this finding was correct as shown by the records in the case of the *Nicomén Boom Co. v. North Shore Boom & Driving Co.*, *supra*. Without entering into a discussion of whether the writ which was sued out was a writ on appeal or review, the writ was applied for and allowed by the chief justice of the supreme court of this state on the 17th day of January, 1906; but this writ was not served for six days after, and was not filed with the clerk of the supreme court of Washington until the 19th of January, 1906, which was subsequent to the time when the logs were removed. The order of the justice of the supreme court superseding a judgment is not all that is required by the law. That is one of the requirements, but it has been held by the supreme court of the United States, in *Sage v. Central R. Co.*, 93 U. S. 412, 23 L. Ed. 933, that a supersedeas, being a statutory writ, is only obtained by strict compliance with all the required conditions, none of which can be dispensed with; and the United States statutes (U. S. Rev. Stats., § 1007) provides:

“In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk’s office where the record remains, within sixty days, Sundays exclusive, after the rendition of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward with the permission of a justice or judge of the appellate court.”

It appears from the record in this case that the service was not made, and that the only thing done was to present an application and secure the allowance of an appeal, and the approval of the chief justice of this court to an appeal bond. As well suggested by counsel for the respondent, counsel for the appellant might have kept this bond after its approval

in their possession any length of time. They did keep it until the 19th day of January, when it was filed, and it was certainly not effective until the bond was given within the contemplation of the statute. The judgment, therefore, was not superseded until all the steps of the statute had been complied with and the bond filed with the proper officer. It not having been filed with the proper officer, nor a copy lodged for the adverse party, there was no suspension whatever of the judgment. See, *Com'rs of Boise Co. v. Gorman*, 19 Wall. 661, 22 L. Ed. 226; *Foster v. Kansas*, 112 U. S. 201, 5 Sup. Ct. 8, 97, 28 L. Ed. 629. This question is governed by the United States statutes, and the decisions of the United States courts are binding. This case being so intimately interwoven with the case of the *Nicomén Boom Co. v. North Shore Boom & Driving Co.*, which has so often been under consideration by this court, we feel, in view of the findings of the court, which we have found to be correct, that a further discussion of the questions raised in this case is uncalled for, and that the other points raised by the appellant are without merit.

The judgment will therefore be affirmed.

CROW, MOUNT, CHADWICK, FULLERTON, and GOSE, JJ., concur.

PARKER and MORRIS, JJ., took no part.

Apr. 1909]

Opinion Per FULLERTON, J.

[No. 7602. Decided April 13, 1909.]

B. J. CARNEY *et al.*, *Respondents*, v. HERMAN VOGEL,
Appellant.¹

APPEAL—REVIEW—HARMLESS ERROR. Error in the admission of evidence is harmless in actions at law tried without a jury.

SALES—BREACH—FAILURE TO DELIVER—MEASURE OF DAMAGES—EVIDENCE—ADMISSIBILITY. In an action for damages for the breach of a contract to deliver telegraph poles, evidence that plaintiff could have procured the poles from other dealers is immaterial, as it does not affect the measure of damages, which is the difference between their contract price and their market value.

Cross-appeals from a judgment of the superior court for Spokane county, Huneke, J., entered January 3, 1908, upon findings awarding the plaintiffs damages for breach of contract, after a trial before the court without a jury. Affirmed.

Allen & Allen and Dalbert E. Twitchell, for appellant.

H. M. Stephens, for respondents.

FULLERTON, J.—In February and March, 1906, the plaintiffs and the defendant entered into three several written contracts by the terms of which the defendant agreed to furnish and deliver to the plaintiffs, on board cars, at Clarks Fork, Idaho, ninety-five hundred telegraph, telephone, and electric light poles, of certain described dimensions, at prices ranging from \$1 to \$2.75 per pole. The contracts were in the form of letters written by the defendant to the plaintiffs, offering to furnish poles delivered at the place named, of certain dimensions at certain prices, cut from fire-killed stock, and the written acceptance of the plaintiffs indorsed thereon. By fire-killed stock, it is explained, was meant timber standing in the forest which had been killed by forest fires. None of the poles were ever delivered, and this action was brought to recover damages for the breach of the contracts.

¹Reported in 100 Pac. 1027.

In their complaint the plaintiffs set out the several contracts, a performance on their part of the terms of the same, in so far as it was capable of being performed by them, and a breach on the part of the defendant. They further averred that the poles were each worth, at the place of delivery, two dollars more than the price at which the defendant agreed to furnish them, and demanded judgment for the sum of \$19,000. The defendant answered, admitting the execution of the contracts and the fact that he had failed to deliver any of the poles contracted for, but alleged that the failure to deliver was the fault of the plaintiffs, in that they had, at divers times prior to July 24, 1906, refused to receive and pay for poles tendered under the contract; and finally, on the date given, absolutely refused to accept or receive any of the poles contracted to be delivered, and since that time have never demanded the delivery of any of the poles. The affirmative allegations of the answer were put in issue by reply. The case was tried by the court without a jury, and resulted in a finding and judgment in favor of the plaintiffs for the sum of \$2,578. Both parties have appealed.

The defendant assigns error on the rulings of the court in admitting and excluding evidence. Whether erroneous evidence has been admitted is not very material, since this court will disregard it and review the facts upon the evidence legitimately within the record. The defendant does not contend that a different result from that arrived at by the trial court must follow if the evidence objected to is excluded, and we shall not therefore notice the specific objections. It is sufficient to say that we have examined the objections, and in so far as we find them well taken, the final conclusion cannot be affected by the evidence not properly admitted.

The claim that admissible evidence was rejected is of more importance, since if the defendant has been denied the right to prove a material matter, opportunity must be given him to do so. The offer of proof was to the effect that the plaintiffs could have procured, at the times the contracts were

Apr. 1909]

Opinion Per FULLERTON, J.

entered into, any quantity of poles of the kind described in the contracts, cut from fire-killed stock, in the vicinity of Clarks Fork, from other dealers. But this was not a material inquiry. The measure of damages in the case at bar was the difference between the contract price of the poles and their market value at the time and place of delivery, and the fact that the plaintiffs might have procured poles from other dealers, would have no tendency to elucidate this question, and it is not contended that it was material on any other theory.

The principal contention made by the defendant on the facts is that the contracts were repudiated by the plaintiffs by refusing to accept the character of poles called for in the contract. On May 17, 1906, the plaintiffs wrote to the defendant telling him not to ship any fire-killed poles on their orders until their Mr. Carney should see him, saying further that their experience with fire-killed poles that spring had been disappointing, owing to the fact that the poles developed weather cracks from end to end. Shortly thereafter Mr. Carney called upon the defendant and the main dispute in the evidence is over what occurred at that time. It is the defendant's contention that the plaintiffs insisted upon obtaining green cut poles in place of the fire-killed stock, but the plaintiffs' evidence tends to show that they wanted only the character of poles contracted for. No poles of any kind, cut either from green stock or fire-killed stock, were shipped, or tendered to be shipped, by the defendant under the contract after that time, although frequent requests and directions for shipment were sent him by the plaintiffs. And, without pursuing the evidence in detail, we think it preponderates in favor of the finding of the trial court to the effect that there was a breach of the contract on the part of the defendant.

The plaintiffs appeal on the question of the amount of damages, contending the amount awarded was grossly inadequate. The court found that there was a difference in the

market value of the poles at the time they were demanded and the contract price of thirty cents per pole, and calculated the damages on this basis, allowing an offset of \$250 due from the plaintiffs to the defendant on another contract. We think the evidence sustains the trial judge on this branch of the case also, and shall not disturb the finding.

The judgment is affirmed.

CHADWICK, MOUNT, CROW, DUNBAR, GOSE, PARKER, and MORRIS, JJ., concur.

[No. 7492. Decided April 13, 1909.]

EDWIN T. COMAN *et al.*, *Appellants*, v. H. C. PETERS *et al.*,
Respondents.¹

MORTGAGES—RIGHT TO FORECLOSE—DEFAULT IN INTEREST—MATURITY OF DEBT—FAILURE TO ELECT. A clause in a mortgage providing that, in the case of the nonpayment of any interest when due, the whole principal and interest shall immediately become due and payable and that the mortgage may be foreclosed for the whole sum is for the benefit of the mortgagee, and is waived by failure of the mortgagee to elect to consider the whole sum due prior to due tender of the interest.

APPEAL—RIGHT TO ALLEGE ERROR—ISSUES NOT DETERMINED—MORTGAGES—FORECLOSURE—DEPOSITS. Upon the dismissal of an action to foreclose a mortgage because prematurely brought, the plaintiff cannot complain of an order requiring the payment of money voluntarily deposited by a defendant for a partial release, the right to which was not determined or in dispute, and which order did not affect the lien of the mortgage.

Appeal from a judgment of the superior court for Adams county, Zent, J., entered February 13, 1908, in favor of the defendants, dismissing on the merits an action to foreclose a mortgage. Affirmed.

¹Reported in 100 Pac. 1002.

Apr. 1909]

Opinion Per PARKER, J.

W. H. Winfree, for appellants.

Edward J. Cannon and *Arthur B. Lee*, for respondent Portland & Seattle Railway Company.

S. H. Steele, for respondents Peters et al., and Palouse Irrigation & Power Co.

PARKER, J.—This is a suit to foreclose a mortgage, and the principal issue involved is whether the debt secured became due before the commencement of the suit. The conclusion we arrive at on this question renders it unnecessary to review the many minor facts, and arguments thereon, presented by learned counsel for the parties, all of which, even if resolved most favorably to appellants, could not avail them or change the result.

The facts, briefly stated, are as follows: On July 15, 1906, the defendants Peters and wife made and delivered to the First Savings & Trust Bank, of Whitman county, three notes for \$10,170, each, payable in two, three, and four years after date, without grace, at 12 o'clock noon, with an interest clause inserted therein as follows: "With interest thereon at the rate of 7 per cent per annum from date hereof until paid, interest payable annually;" and to secure payment thereof, on the same day executed and delivered to the bank a mortgage upon certain lands, which mortgage contained the following clause:

"In case any principal or interest as above provided in said notes shall become due and remain unpaid, then the whole of the principal and interest of said notes and all moneys secured hereby shall immediately become due and payable, and this mortgage may be foreclosed for the whole of such moneys."

There is considerable in the record and arguments of counsel dealing with the question whether the acts and communications of the parties amounted to a tender of the interest on July 15, 1907, being the day on which the first annual installment thereof became due. We pass this, however, as

unnecessary for our consideration. The next morning, July 16, 1907, the Colfax National Bank, in behalf of the payors of the notes, being authorized so to do, tendered to the First Savings & Trust Bank, which was then still the owner of the notes, the sum of \$2,135.70 in gold coin, being the amount of interest falling due the day previous. This tender has since been kept good. It was refused by the First Savings & Trust Bank, because, as it claimed, the whole indebtedness had become due by virtue of the provisions of the mortgage above quoted and failure to pay the interest the day previous. Just what was said at this time indicating an intention on the part of the payee to claim the whole debt as then due by reason of failure to pay the interest on the day previous is not clear. But it is certain that up to the moment the tender was made, and the gold coin actually produced therefor, there had not been any notice, or even intimation by the payee bank, to the payors, or to the bank which was acting as their agent, that the interest money would be refused, or that it (payee) elected to declare the whole debt due. A few days later this suit was commenced to foreclose the mortgage, and has been prosecuted upon the theory that the entire debt secured thereby became due upon failure to pay the interest accruing July 15, 1907, on that day. Peters and wife conveyed the land to the Irrigation and Power Company, the Railway Company acquired a right of way over the land, and the notes and mortgages were assigned to the plaintiffs and appellants, all of which accounts for the present parties to the suit. The suit was dismissed by the trial court upon the ground the debt had not matured, and plaintiffs appealed.

The principal contention of the attorneys for the appellants, and in our opinion the one upon which this whole controversy turns, is that the language of the mortgage, not containing any words of option indicating an election necessary by the payee to mature the whole debt, and apparently unqualifiedly providing that upon default all moneys secured "shall immediately become due and payable," has the effect

Apr. 1909]

Opinion Per PARKER, J.

of maturing the whole debt upon default, without any affirmative act or any claim on the part of the payee.

This court has heretofore decided the principle here involved against this contention, and has made no distinction between a case where there are words of option in the mortgage or agreement and cases where there are none, so far as the duty of the payee is concerned in electing to declare the whole debt due in order to effect the maturity of the debt; and has held that in neither case would the whole debt become due upon default without some affirmative action indicating an election on the part of the payee.

In the case of *First Nat. Bank of Snohomish v. Parker*, 28 Wash. 234, 68 Pac. 756, 92 Am. St. 828, there was a provision in the mortgage to the effect that, upon default of the payment of the interest or any part when due, the right of foreclosure should immediately accrue. The default apparently occurred more than six years before the commencement of the suit, and the statute of limitations was set up as a defense by the maker of the note and mortgage. The court there held that the general rule as to the effect of such stipulation, "is that such default must be claimed by the mortgagee or it is waived. It is for the benefit of the mortgagee, and cannot be taken advantage of by the mortgagor;" holding that the debt did not accrue upon the mere default so as to start the statute of limitations running, and of course, if it did not accrue for that purpose, it did not accrue so as to give the holder a right of action at that time.

In the case of *White v. Krutz*, 37 Wash. 34, 79 Pac. 495, there was a provision even farther reaching than the one before us. It was contained in a subsequent written agreement extending the time of payments of a mortgage, and provided that, if default should be made in any of such payments, the indebtedness represented by the original note and mortgage should "immediately become due and payable without notice." Here, again, it was held by this court, that the debt did not mature upon the mere happening of the de-

fault so as to start the running of the statute of limitations.

In the case of *Zeimantz v. Blake*, 39 Wash. 6, 80 Pac. 822, this court had under consideration a contract for the purchase of land in which time was made the essence thereof, and upon default in payments the purchaser was to forfeit his rights, apparently without any affirmative act of the seller, and it was there held that while the seller could declare the forfeiture and cut off the purchaser's rights, it required some affirmative act on his part to do so, and if he remained passive until the purchaser made tender of payment, he was obliged to accept and perform his part of the contract. Upon the doctrine of these decisions, this court recently decided the case of *Weinberg v. Naher*, 51 Wash. 591, 99 Pac. 736, in which case, however, the words, "at the option of the holder of the note," was incorporated in the agreement.

Thus it is plain that this court is fully committed to the doctrine—and we think rightfully so, that mere default in payment does not mature the whole debt—whether there be words of option in the agreement or not. Such a provision hastening the date of maturity of the whole debt is for the benefit of the payee, and if he does not manifest any intention to claim it, before tender is actually made, there is in law no default such as will cause the maturity of the debt before the regular time provided in the agreement. We are of the opinion that the suit was prematurely commenced, and that the same was rightfully dismissed by the trial court on that account.

The respondent Railway Company filed with its answer to the complaint a cross bill, seeking to require the plaintiffs to release the lien of their mortgage upon the portion of the land covered by the right of way it had acquired by agreement with the Irrigation & Power Company; at the same time deposited in court \$9,000, which it claimed was more than sufficient to pay plaintiffs and entitle it to a release from them of their mortgage lien upon its right of way, under the terms of the mortgage; and prayed that the court determine

Apr. 1909]

Opinion Per PARKER, J.

what portion thereof plaintiffs were entitled to for such release and decree accordingly. The court never adjudicated this matter between the plaintiffs and any of the defendants, but did, before trial, make an order at the instance of the Irrigation & Power Company directing the clerk of the court to pay to it \$5,000 of this money; the making of which order, it is claimed by appellants, is error which they strenuously argue should be corrected and the order set aside by this court.

There does not seem to have been any controversy between the Irrigation Company and the Railway Company as to their respective rights to this money. Indeed, it seems to have been a part of the compensation agreed upon to be paid by the Railway Company to the Irrigation Company in acquiring the former's right of way, and by their common consent deposited in court to the end that so much of it as became necessary be paid to plaintiffs for release of the mortgage upon the right of way, when the court should adjudicate that question as against plaintiffs. But this branch of the case never was tried or adjudicated by the court. Indeed, it appears by the very terms of the final decree dismissing the cause that the court expressly refused to try or pass upon that matter, which was in harmony with plaintiffs' contentions all through the case. The court, by its final decree, simply dismissed the case, because the debt sued upon had not matured, and hence plaintiffs had no cause of action. We are not able to see how this order for the payment of the \$5,000 to the Irrigation Company affected plaintiffs' rights, or the lien of their mortgage on the land covered by the railway's right of way, in the least; hence, they could not complain of it. Plaintiffs made no prayer for affirmative relief other than was strictly incidental to their right to foreclose at this time, and no affirmative relief was granted against them other than the judgment for costs and the cancellation of their *lis pendens* filed in the auditor's office.

We conclude that the disposition of the cause by the trial court should be affirmed, and it is so ordered.

MOUNT, CROW, DUNBAR, GOSE, FULLERTON, and MORRIS, JJ., concur.

CHADWICK, J., took no part.

[No. 7690. Decided April 13, 1909.]

A. H. CLAMBEY *et al.*, Appellants, v. D. L. COPLAND *et al.*, Respondents.¹

APPEAL—REVIEW—FINDINGS OF FACT—SUFFICIENCY. In the absence of the evidence, a finding of fact that a deed was given and intended as security for a debt is not bad as a conclusion of law.

SAME—FINDINGS IN EQUITY—NECESSITY. Incomplete or defective findings are not ground for reversal in an equity case, since no findings are necessary to support the decree.

EVIDENCE—PAROL VARYING WRITING—DEED AND OPTION GIVEN AS MORTGAGE. Where a deed was given as security for a debt, the grantee giving back to the grantor an "option to purchase," oral evidence showing that the intent of the parties was to consider the two instruments as a mortgage is not inadmissible as varying the terms of the written option.

QUIETING TITLE—DEEDS INTENDED AS MORTGAGE—ISSUES—JUDGMENT—UNNECESSARY PARTIES. Where the owners of premises had successively given two deeds thereof to secure debts to different parties, an action brought by the first grantee against the second grantee to remove the cloud of the latter's deed is properly dismissed, where it is shown that both deeds were intended as mortgages; and it is immaterial that the mortgagors were not parties to the action.

Appeal from a judgment of the superior court for King county, Morris, J., entered April 16, 1908, upon findings in favor of the defendants, in an action to quiet title. Affirmed.

S. S. Langland and *O. E. Sauter*, for appellants.

Charles A. Riddle, for respondents.

PARKER, J.—This is an action prosecuted by the appellants, plaintiffs below, to remove a cloud upon and quiet title to lot 2, block 16, of Central Seattle. The matters presented for our consideration involve only the correctness of the

¹Reported in 100 Pac. 1031.

Apr. 1909]

Opinion Per PARKER, J.

trial court's conclusions of law and decree rendered upon the findings of fact, none of the evidence having been brought into the record by statement of facts or bill of exceptions.

From the court's findings of fact, it appears that on November 17, 1903, Charles P. Downer and wife became indebted to the plaintiff A. H. Clambey in the sum of \$300, and being the owners of the premises in question, executed and delivered to him a deed therefor as security for the payment of such indebtedness, and not otherwise, which deed was duly recorded in the office of the auditor of King county. Contemporaneously with the execution and delivery of the deed, the plaintiff A. H. Clambey executed and delivered back to Charles P. Downer the following instrument in writing:

"OPTION TO PURCHASE.

"A. H. Clambey, of Seattle, Washington, does hereby give an option to Charles P. Downer of same place to purchase Lot Two (2) Block Sixteen (16) in Central Seattle, King county, state of Washington, according to the plat on file and of record in the office of the county auditor of said county and state for a purchase price of three hundred and sixty dollars (\$360.00) to be paid as follows:

December	17, 1903.....	\$30.00
January	17, 1904.....	30.00
February	17, 1904.....	30.00
March	17, 1904.....	30.00
April	17, 1904.....	30.00
May	17, 1904.....	30.00
June	17, 1904.....	30.00
July	17, 1904.....	30.00
August	17, 1904.....	30.00
September	17, 1904.....	30.00
October	17, 1904.....	30.00
November	17, 1904.....	30.00

"It is hereby expressly and mutually understood that should said Charles P. Downer fail to meet any of the payments promptly when due, expires this option and money paid forfeited.

"Dated Seattle, Washington, November 17th, 1903.

"A. H. Clambey."

Thereafter Downer continued to exercise ownership and dominion over the premises. About January 1, 1904, Downer not having made any of the payments provided for in the latter instrument, returned it to plaintiffs, giving them notice that he refused to comply with its terms.

On February 27, 1904, Downer and wife executed and delivered to the defendant D. L. Copland a second deed for the same premises, which was duly recorded in the office of the auditor of King county; which deed was given for the purpose of securing the payment of a debt evidenced by a \$400 promissory note, executed September 10th, 1903, by Downer and wife to Georgina Copland, which had by assignment become the property of the defendant D. L. Copland. Both of these notes remain unpaid, and no action has been commenced upon either of them, or to foreclose upon the premises pledged as security therefor by the two deeds. Prior to the commencement of this action, the defendant D. L. Copland offered to pay to the plaintiffs all the indebtedness due them from Charles P. Downer, with interest, including taxes and other legal charges paid out by them upon the premises, which plaintiffs have at all times refused to accept.

Upon these facts, the learned trial court concluded, as matters of law, that the deed given by Downer and wife to the plaintiff A. H. Clambey, November 17, 1903, was intended by the parties thereto as, and at all times was and is, a mortgage; and that the second deed given by Downer and wife to the defendant D. L. Copland on February 27, 1904, was intended by the parties thereto as a mortgage, and thereupon made and entered its decree accordingly, denying the relief prayed for by plaintiffs.

It is contended by attorneys for the appellants that the deed from Downer and wife to Clambey was held by the learned trial court to be in effect a mortgage, upon the deed and the contemporaneous so-called "Option to purchase," and upon no other facts; and that the court's general finding of fact that the deed was given "as a security . . . and

Apr. 1909]

Opinion Per PARKER, J.

not otherwise" is a mere conclusion of law, there being no detail facts or circumstances found from which such a conclusion could be drawn. And, with this as their premise, they argue that these two instruments, standing alone, do not warrant the conclusion that the deed was in legal effect only a mortgage.

We are unable to agree with the contention that the general finding to the effect that the deed was given as security, and not otherwise, is a mere conclusion of law. It probably was based upon detailed facts and circumstances shown by the evidence; and in this respect it may be in a sense a conclusion of fact, as are practically all findings of fact except such as are clothed in the very words of the evidence on which they are based. It is the ultimate or general fact found. In the absence of the evidence, which is not here for our review, we must conclude that this finding is a correct statement of the intention of the parties to the deed. *Rathbun v. Thurston County*, 2 Wash. 564, 27 Pac. 448; *Ferry v. King County*, 2 Wash. 337, 26 Pac. 537. Besides, this is a suit in equity, and as has been held by this court no formal findings are necessary to support the decree. (*White Crest Canning Co. v. Sims*, 30 Wash. 374, 70 Pac. 1003); from which it follows that incomplete or defective findings of fact will not render the decree erroneous unless it affirmatively so appears therefrom. *Slyfield v. Willard*, 43 Wash. 179, 86 Pac. 392; *Gould v. Austin*, ante p. 457, 100 Pac. 1029.

It is argued that the holding of the trial court violates the rule that a written contract cannot be varied or contradicted by oral testimony. Counsel concede that oral testimony to prove an instrument, on its face a deed, to be a mortgage, is a well-known exception to the rule; but contend that this option to purchase is an entire contract within itself, and cannot be so varied or contradicted; citing *Pease v. Baxter*, 12 Wash. 567, 41 Pac. 899. But in that case this court was dealing with a written contract for the sale of land containing provisions for the forfeiture of the purchaser's rights

upon failure to comply with conditions therein expressed, which contract constituted the entire agreement of the parties, and being in writing, of course could not be varied or contradicted by oral testimony. In the case before us, this so-called "option to purchase" is not the instrument that is being varied. It is only evidence, together with other evidence—which we must conclude was sufficient—showing that the deed was intended by the parties only as security, and therefore legally a mortgage. It seems to us that the facts found clearly lead to the conclusion that it was in legal effect a mortgage, and that being the legal character of the instrument at the time of its execution, it was not thereafter changed, as is contended, into an absolute conveyance. In 1st Jones on Mortgages (6th ed.), § 263, the rule is stated as follows:

"The character of the transaction is fixed at the inception of it and is what the intention of the parties makes it. The form of the transaction and the circumstances attending it are the means of finding out the intention. If it was a mortgage in the beginning it remains so."

See, also, *Macaulay v. Smith*, 132 N. Y. 524, 30 N. E. 997; *Wasatch Min. Co. v. Jennings*, 5 Utah 243, 15 Pac. 65; *Poston v. Jones*, 122 N. C. 536, 29 S. E. 951; 3 Pomeroy, Equity Jurisprudence (2d ed.), 1194; 20 Am. & Eng. Ency. Law (2d ed.), p. 938.

A mortgage in this state is a mere lien and does not convey the fee, and the fact that it was in the form of a deed absolute upon its face, does not change its legal effect in this respect. It is still a mortgage and remains just as far short of conveying the fee as though it were a mortgage in form. *Snyder v. Parker*, 19 Wash. 276, 53 Pac. 59, 67 Am. St. 726. Even where it is held that such a mortgage can, after execution by the parties, be converted into a conveyance of the fee, its effect can be thus changed only by a new contract between them. 27 Cyc. 993. Whatever the requirements of such new contract may be in other jurisdictions, in the light

Apr. 1909]

Opinion Per PARKER, J.

of their statute of frauds and their law as to whether or not a mortgage conveys the fee, since a mortgage does not convey the fee under our law, it seems plain that no agreement made thereafter between the parties which is less formal than a deed executed as the statute requires would pass the title. This, however, would not be a conversion of the mortgage into an absolute conveyance, but would be a conveyance independent of the mortgage. In support of this view the supreme court of Oregon, in *Marshall v. Williams*, 21 Ore. 268, 28 Pac. 137, uses the following language:

"The mortgagor may release the equity of redemption to the mortgagee, but being an interest in real estate, it can only be transferred or relinquished by a writing executed as required by the statute of frauds. This rule applies as well to a deed absolute in form intended as a mortgage as to an ordinary mortgage."

It is finally urged by appellants' attorneys that the court's decree was erroneously rendered because the Downers were not parties to this action. Whatever might be the answer to this contention had the trial court passed upon the matters of affirmative relief prayed for by the respondents in their cross-complaint, it is plain there was no attempt by the court to pass upon any of the rights of the Downers. The decree simply denied the relief prayed for by plaintiffs, holding that they are not the owners of the premises in fee but only mortgagees, as against the rights of respondents.

We conclude that the record before us shows the learned trial court correctly determined the rights of the parties to this appeal, and its decree is therefore affirmed.

DUNBAR, MOUNT, CROW, FULLERTON, GOSE, and CHADWICK, JJ., concur.

MORRIS, J., took no part.

[No. 7394. Decided April 13, 1909.]

THOMAS F. SULLY *et al.*, *Appellants*, v. JOHN BUSHELL,
Respondent.¹

CONTRACTS—RESCISSION—LANDLORD AND TENANT—LEASE—ASSIGNMENT. A contract for the assignment of a lease requiring the landlord's consent thereto is mutually rescinded where the landlord refused to consent to the assignment, the assignee was notified thereof, and the earnest money was returned by check, which the assignee accepted and held for seven months.

Appeal from a judgment of the superior court for King county, Yakey, J., entered December 18, 1907, in favor of the defendant, dismissing an action on contract, after a trial on the merits before the court without a jury. Affirmed.

Shepard & Flett, for appellants.

Smith & Cole, for respondent.

MORRIS, J.—On January 12, 1907, appellants and respondent entered into negotiations for the assignment of a certain lease then held by respondent, for which appellants agreed to pay the sum of \$250. They paid \$200 of such sum, and respondent gave them a receipt reading as follows:

“Seattle, Washington, January 12, 1907.

“Received of Sully & Ball the sum of \$200 to apply on payment of a bonus of \$250 to secure the rental of the business location now occupied by the Seattle Auction Company, at 809 and 811, Pike street, with basements under 807, 809, and 811, Pike street, for which the rental is to be \$150 per month for a term ending June 1, 1911; the agreement to be drawn up in duplicate and signed by the parties concerned to insure a proper protection of the right of each.

“John Bushell.”

No further agreement was ever entered into, and appellants never entered into possession of the premises. On September 13, 1907, appellants commenced this action, alleging the re-

¹Reported in 100 Pac. 995.

Apr. 1909]

Opinion Per MORRIS, J.

fusal of respondent to give them possession of the premises; that the value of the premises was \$250 per month, and demanding damages at the rate of \$100 per month. Respondent answered, alleging the refusal of appellants to enter into the proposed agreement, and that on February 20, 1907, the parties being unable to reach a further agreement, he returned the \$200, and by the consent of all parties the negotiations were ended. The case was tried by the court without a jury, resulting in judgment for respondent.

Much contention is made in the briefs as to whether the writing above set out is a contract for a lease, or a mere receipt for the payment of money. We do not care to enter upon a discussion of that question, as in our view of the case it is immaterial. It appears from the evidence, and the court so found, that the lease held by the respondent contained a provision against assignment without the consent of the landlord, and that this fact was communicated to appellants during the negotiations of January 12; that on February 20, following, respondent informed appellants that the landlord would not consent to the assignment of the lease; that he thereupon gave them his check for \$200 in return for the payment made on January 12, which appellants received; and that they had cancelled all negotiations. These findings were sufficient to justify the judgment, and in view of the conflicting evidence upon which they are based, we do not care to disturb them.

It further appears that appellants did not cash the check, nor did they return it, nor was any attempt made to conclude the matter further, up to the commencement of this action, nearly seven months thereafter. If appellants did not desire to accept the check in settlement of the controversy, they should have returned it or given respondent some intimation of their unwillingness to accept it.

The judgment is affirmed.

DUNBAR, GOSE, FULLERTON, CROW, MOUNT, CHADWICK, and PARKER, JJ., concur.

[No. 7527. Decided April 13, 1909.]

A. SCHLOSSMACHER, *Appellant*, v. BEACON PLACE COMPANY
AND TERRY HEIRS, *Respondents*.¹

APPEAL—REVIEW—FINDINGS OF FACT—NECESSITY. Findings of fact are not essential to support a decree in an equity case.

SAME—PRESERVATION OF GROUNDS. Error cannot be predicated upon failure to make findings and conclusions where no request therefor was made or objections interposed.

ADVERSE POSSESSION—INCORRECT DEED—COLOR OF TITLE AND CLAIM OF RIGHT. A deed incorrectly describing a tract constitutes color of title, and the grantees acquire title by adverse possession under claim of right, where they took possession of the land intended to be conveyed, and adversely held for fourteen years under the belief that they were in actual possession of property conveyed by the deed.

ESTOPPEL—ADVERSE POSSESSION—ACCEPTING REPAYMENT OF TAX. One claiming title to land by adverse possession, who by mistake paid a tax on adjoining land of the adverse claimant, is not estopped from asserting claim to the land in his possession by accepting repayment of the tax on the adjoining land.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered January 17, 1908, upon findings awarding damages to one of two claimants of property, after a trial of issues raised in interpleader in condemnation proceedings. Affirmed.

Charles E. Patterson and *Charles R. Crouch*, for appellant.

Leander T. Turner (*Sanford C. Rose*, of counsel), for respondent Beacon Place Company.

MORRIS, J.—In the proceeding to widen Dearborn street, in the city of Seattle, a piece of ground, 11.94 feet wide by 120 feet deep, was condemned, and its value was fixed by the jury at the sum of \$2,160. This piece of ground was claimed by A. Schlossmacher, the heirs of Chas. C. Terry, and the Beacon Place Company, a corporation; whereupon the court made its order directing the above parties to inter-

¹Reported in 100 Pac. 1013.

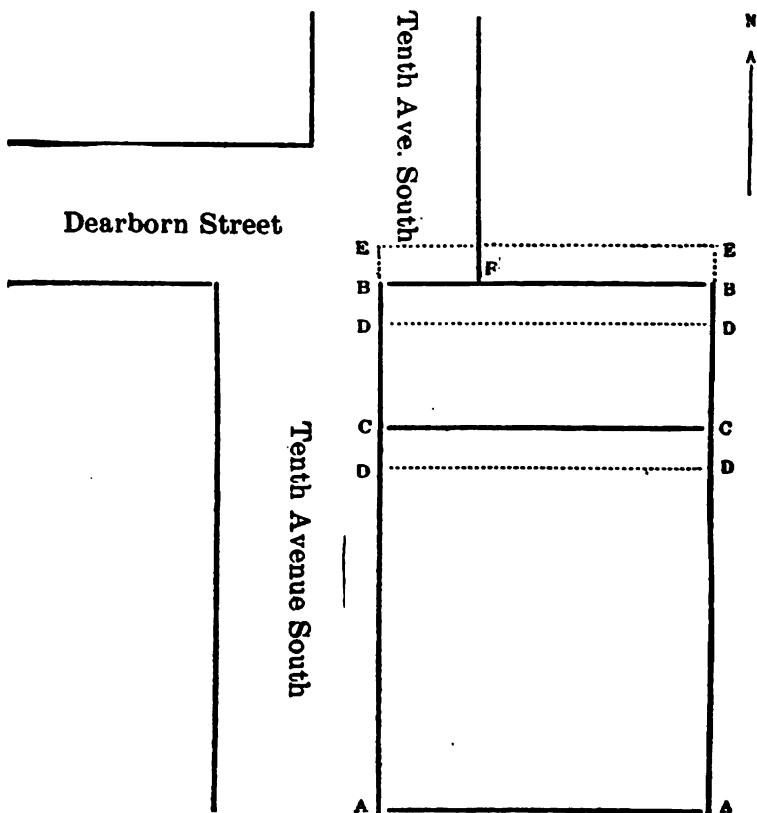
Apr. 1909]

Opinion Per MORRIS, J.

plead in order to determine who was the rightful owner of the property and entitled to the award. Upon such interpleader, issues were duly made, a trial was had, and the court entered its decree awarding the damages for the taking to the Beacon Place Company as the rightful owner of the property; from which judgment Schlossmacher appeals.

The first error assigned is that the court failed to make findings of fact and conclusions of law. If this is an equitable action or proceeding, it has long been the established rule in this court that findings of fact and conclusions of law are not necessary in equitable actions. If it be regarded as the trial of an issue of fact by the court, the record discloses no request for findings, and this court has uniformly held that a judgment will not be reversed on appeal for want of findings of fact and conclusions of law, where the record fails to show a request for such findings and conclusions, or any objection raised in the court below because of such failure. *Washington Rock Plaster Co. v. Johnson*, 10 Wash. 445, 39 Pac. 115; *Remington v. Price*, 13 Wash. 76, 42 Pac. 527; *Slayton v. Felt*, 40 Wash. 1, 82 Pac. 173. There is, therefore, no merit in this assignment.

The remaining assignments are based upon the judgment in holding the Beacon Place Company to be the owner of the land in dispute. A better understanding of the facts involved herein will be had by reference to the following diagram:



The tract of land in dispute is marked B B D D. Schlossmacher claims under a tax deed from the county treasurer, dated Dec. 2, 1902, in which the land conveyed is described as,

"Beginning 66 feet south, 710 east, from southeast corner, block 52, of Maynard's Plat; thence north 11.34 feet; thence east 120 feet; thence south 11.34 feet; thence west 120 feet, to beginning;"

the initial point being B, on the east line of Tenth avenue south. This description calls for the tract marked E E B B, a strip immediately north of the tract in controversy. The grantor of the Beacon Place Company was one Nelson, by

Apr. 1909]

Opinion Per MORRIS, J.

deed dated March 8, 1905, in which the land conveyed is described as,

"Commencing at the southwest corner of lot No. one, as shown on the Plat of Beacon Place; thence running east along the south line of said lot No. one, 73 feet more or less, to the Northwest corner of lot No. 13 on said plat; thence turning and running south to a point 139 feet north of the south boundary line of the tract of land conveyed by D. S. Maynard and wife to Chas. C. Terry, 50 feet more or less; thence turning and running west 120 feet; thence turning and running north to the south line of Dearborn street extended, 50 feet more or less; thence turning and running east 48 feet more or less to the point of beginning."

The initial point of this description is the point F, and the tract in dispute, B B D D, is included therein as the north 11.34 feet of said description. The grantor of Nelson was one Allen, by deed dated July 14, 1890; Allen being the grantee in a deed from one Turner, dated Nov. 6, 1883, in both of which deeds the property conveyed is described as,

"Commencing at a point on the south line of the tract of land conveyed by D. S. Maynard and wife to Chas. C. Terry by deed of date July 11, 1857, and recorded in Book B on page 146 of the records of King county, W. T., which point is 255 feet south of and 710 east of the southwest corner of block 52 of D. S. Maynard's Plat of town (now city) of Seattle, and running thence north 139 feet to place of beginning; thence east 120; thence north 50 feet; thence west 120 feet; thence south 50 feet to place of beginning, containing 50 by 120 feet of ground."

The land thus described is the tract D D D D. This south line of the tract of land conveyed by Maynard to Terry, described as 255 feet south of the southeast corner of block 52 of Maynard's Plat, was in fact 266 feet south of the southeast corner of block 52; Dearborn street being 66 feet wide, and the Terry tract 200 feet long. All of the parties to these various deeds were evidently under the impression that the Terry tract was in fact only 189 feet long, as Terry conveyed 189 feet to Turner, and Turner conveyed the same

description to Nelson. Nelson, however, believing the north line of his 50 feet was the south line of Dearborn street and Dearborn street extended, took possession of the tract B B C C, and from July 14, 1890, to March 8, 1905, when he sold to the Beacon Place Company, nearly fifteen years, he held possession, claiming under his deed. At the time Nelson took possession there was a bulkhead on the north line of the tract, on a line with the south line of Dearborn street and running 50 feet south on Tenth avenue, the line of this bulkhead being the line B B, east and west, and the line B C north and south, these bulkheads being replaced from time to time during his occupancy as needed. The property was also improved by terracing down to these bulkheads.

Prior to the occupancy of Nelson, a house had been erected upon the lot, and also a woodshed which, as described by Mrs. Nelson, was built "on the north edge of the lot" and "run up the south line of Dearborn street." During the years of this occupancy, Nelson and his wife paid the taxes upon the property.

It is apparent that the land taken possession of by Allen was the land he intended to convey to Nelson, and that Nelson intended to purchase; and which, after being held in open, notorious, continuous, and adverse possession for fourteen years, was conveyed to the Beacon Place Company. As between Allen and Nelson, the construction given to the deed would have been controlling.

"The contemporaneous construction by vendor and vendee evidenced by giving of possession will fix the true meaning and intent of the parties." *Town of Como v. Pointer*, 87 Miss. 712, 40 South. 260.

It is, however, urged by appellant that the Nelsons did not hold under "Color of title and claim of right." Their possession under the Allen deed, the construction and intent placed upon that deed as to the property thereby conveyed, their possession under the belief that they were actually in possession of the property conveyed, and their intention to

Apr. 1909]

Opinion Per MORRIS, J.

so hold, would be a holding under a color of title. In the case of *Flint v. Long*, 12 Wash. 342, 41 Pac. 49, this court in speaking of "color of title" in this connection, says:

"All that is necessary to be shown is that there was a proof of colorable title under which the entry or claim has been made in good faith."

There can be no question but that the entry and claim of Nelson was made in good faith. On cross-examination Mrs. Nelson testified as follows:

"Q. Where was your north line? A. It was right on a line with Dearborn street. Q. When you went there, your idea was to take possession, of course? A. Certainly. Q. Of just what your deed called for? A. Just that. Q. You had no intention of taking possession of any more property than you were entitled to under your deed? A. No, sir."

Appellant urges that this testimony shows the possession of the Nelsons was not under a claim of right, and cites *Wilcox v. Smith*, 38 Wash. 585, 80 Pac. 803. The rule announced in that case is:

"If a party only claims to a given line, and makes no claim as to where such line is located, his adverse possession is limited to such line wherever the same may be established."

That case is not controlling here, for the reason that the testimony shows that the Nelsons *did make a claim* to their true north line as the south line of Dearborn street, and that for over fourteen years they openly and notoriously claimed this line by the maintenance of the bulkhead as their true north line. The rule applicable to the facts in this case is as held in *Bowers v. Ledgerwood*, 25 Wash. 14, 64 Pac. 936, adopting the doctrine of *Causfield v. Clark*, 17 Ore. 473, 21 Pac. 443, 11 Am. St. 845: "If one by mistake inclose the land of another, and claim it as his own, his actual possession will work a disseizure." The Nelsons may have been mistaken in regarding the south line of Dearborn street as their true north line, but they did so regard it; not under any theory of an intention to hold only to the true line, as it

might be subsequently ascertained, as in *Wilcox v. Smith, supra*, but under the belief that their deed called for such line as the true boundary line, and a manifest intention on their part to so regard it and hold it as against all the world.

One other assignment of error is made, based upon the fact that on July 25, 1905, Schlossmacher paid to the Beacon Place Company \$2.31, which the latter had paid as taxes upon the tract covered by Schlossmacher's deed. This, appellant claims, operates as an estoppel against respondent's claim to the awards of the jury in the condemnation action. Respondent's brief answers this assignment so tersely we adopt its language as our own: "If appellant's deed covers the land in controversy, appellant needs no doctrine of estoppel to protect him. If it does not, there is no reason why Beacon Place Company should not accept repayment of taxes erroneously paid by that company upon the land described in appellant's deed. Beacon Place Company had already paid the taxes upon the land in controversy, and were not interested in paying taxes upon other land not claimed by them."

Finding no error, the judgment is affirmed.

PARKER, GOSE, FULLERTON, DUNBAR, CROW, MOUNT, and CHADWICK, JJ., concur.

Apr. 1909]

Opinion Per FULLERTON, J.

[No. 7513. Decided April 13, 1909.]

VICTOR PIERSON *et al.*, *Appellants*, v. NORTHERN PACIFIC
RAILWAY COMPANY, *Respondent*.¹

CARRIERS—LIVE STOCK—NEGLIGENCE—VIOLATING LAW REQUIRING UNLOADING. A railroad company is guilty of negligence in carrying horses that had already been on the road ten hours, and continuing the journey so as to make forty-five consecutive hours of travel without unloading, feeding, or watering, after repeated requests therefor, although it may not have been notified of the time they were on the road before it accepted the shipment; and irrespective of the Federal statute forbidding more than 28 consecutive hours' travel without unloading.

SAME—DEATH OF HORSES—PROXIMATE CAUSE. Negligence of a railroad company in carrying horses for forty-five consecutive hours without unloading for rest, food or water, is the proximate cause of their death, where they were so weakened and rendered susceptible to attack by disease that they sickened and died when unwittingly exposed to disease by their owners in endeavoring to bring them back to a normal condition.

EVIDENCE—OPINIONS—NONEXPERT EVIDENCE AS TO CAUSE OF DEATH OF HORSES. One who is possessed of only common knowledge on the question is incompetent to give his opinion as to the cause of the sickness and death of horses carried in violation of the Federal statute requiring unloading for rest, food, and water.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered April 18, 1908, in favor of the defendant, upon granting a nonsuit, in an action to recover for damages to horses transported. Reversed.

Hurn & Curtiss, for appellants.

Edward J. Cannon and *Arthur B. Lee*, for respondent.

FULLERTON, J.—The appellants brought this action against the respondent to recover damages caused, as they alleged, by the respondent's maltreatment of certain horses, which the appellants shipped over the respondent's road. They were nonsuited at the conclusion of their evidence in

¹Reported in 100 Pac. 999.

chief in the court below, and appeal from the judgment entered against them.

The facts appearing in the record at the time the nonsuit was granted were, in substance, these: On the first days of August, 1906, Victor Pierson, one of the appellants, purchased from a ranchman living near Dillon, Montana, eighteen head of draft horses and one driving horse, intending them for use in the business of logging conducted by himself and his brother at Priest River, Idaho. The horses were taken from the ranches of the person from whom they were purchased on the day of August 6, 1906, and driven, a part of them eight miles and a part of them six miles, into Dillon, and loaded on an ordinary stock car about six o'clock in the afternoon of that day. From Dillon they were carried during the night of August 6th to Silver Bow, Montana, where they arrived in the early morning of August 7, probably between four and five o'clock. At that place the horses were turned over to the respondent for shipment to Sandpoint, Idaho, and were carried by the respondent to that point in the same car on which they were originally loaded. The shipment reached Sandpoint between three and four o'clock in the afternoon of August 8th, having been on the way upwards of forty-five hours. The animals were without food of any kind during the entire trip, and eleven of them were without water; the other eight having been given a small quantity at Reed's station, on the afternoon of August 7th, by Victor Pierson, who accompanied the shipment. Nor were the animals unloaded for rest, feed or water during the trip, although requests were made of the parties in charge of the train, and of the train dispatchers and station agents, at different points along the way, that the car be sent to the stock yards so that the animals could be taken out, rested, watered and fed.

On reaching Sandpoint, the animals were at once removed from the car and taken to a nearby barn, where they were given a small quantity of water. Later on another small

Apr. 1909]

Opinion Per FULLERTON, J.

quantity of water was given them with a light feed of timothy hay, about five pounds to the team, and still later more water, but not any considerable quantity even at that time. It was testified that the water was pure, being taken from the stream out of which the inhabitants of Sandpoint obtained water for household purposes, and that the hay was very good, being bright and clean. The owners left the horses about eleven o'clock at night of the evening of their arrival, when they all seemed to be in good condition, other than that they appeared very tired, a symptom they had manifested when removed from the car and for a considerable time before their removal. One of the owners returned to the horses at four o'clock in the morning, when he found one of the animals down and suffering great pain. Effort was made at once to relieve it, but without success, and it died in the early morning. In the meantime others of the animals became sick in the same manner, until all of them were afflicted, and during the day and night following ten more of them died, although the aid of a veterinary surgeon was called, and such remedies as he prescribed administered. The animals dying were the ones, according to the testimony of Victor Pierson, that received no water while being carried on the car.

The evidence is not very clear as to the symptoms manifested by the horses preceding their death, but it can be gathered therefrom that they suffered great pain in the region of the bowels; that their breathing was hard and labored; that they had fever, and diarrhoea quite marked and severe. The animal, as the disease progressed, would throw himself and thrash about, beating and bruising his head, and soon become too weak to rise, when death would soon follow. A veterinary surgeon, called as an expert, although not the veterinary who attended the animals while sick, gave it as his opinion that the animals died of enteritis or gastroenteritis, which he described as an inflammation of the intestinal tract, caused by some irritant taken with the food or drink. He stated further that this irritant could be either

chemical or bacterial, and would operate more readily and fatally on animals whose vitality was low by reason of their having been deprived of water and food for a considerable length of time; that the treatment accorded these animals after being taken from the car, while not the best, was good; and further, what obviously must be the case, that pure water and good hay, fed to an animal weak from fasting and fatigue, if not in undue quantities, will not hurt him.

That the evidence shows negligent treatment of these animals on the part of the railway company, we think cannot be gainsaid. Not only was there a violation of the Federal statutes, which forbids the confinement of animals in cars of the character on which these horses were shipped for a longer period than twenty-eight consecutive hours, without unloading the same for rest, water and feeding, but the time in which these animals were confined was so long, and so far without necessity, as to constitute negligence in the absence of a statute forbidding it. The respondent argues in this connection, it is true, that it does not appear that it was notified of the time the animals had been on the car before it reached Silver Bow, the point at which the respondent received the car. But the Federal statute covers this question. It provides that in estimating the time of such confinement the time during which the animals have been confined without rest on connecting roads shall be included; thus making it the duty of the connecting carrier to inquire concerning such time when the animals are received by it, if the fact does not appear on the way bills submitted to it. Moreover, in this case, there were repeated demands made by the owner to the company's agents and officers that the animals be rested. This of itself was sufficient to put the defendant on inquiry, even though nothing was said by the owner when making the demand as to the time the animals had then been on the car without rest. Clearly, therefore, there was negligence on the part of the respondent.

But it is said, and on this contention the trial court seems

Apr. 1909]

Opinion Per FULLERTON, J.

to have rested its decision, there is no evidence tending to connect the negligence of the respondent with the death of the animals. In other words, it is not shown that the respondent's negligence was the proximate cause of the injury. We cannot think, however, that the evidence is thus barren. The proximate cause of an injury may, in general, be stated to be that act or omission which immediately causes the injury. It need not be the sole cause; it is enough if it is the efficient cause, the one that necessarily sets the other causes in operation.

"It is well settled that the mere fact that there have been intervening causes between the defendant's negligence and the plaintiff's injuries is not sufficient in law to relieve the former from liability; that is to say, the plaintiff's injuries may yet be natural and proximate in law, although between the defendant's negligence and the injuries, other causes, conditions, or agencies have operated, and when this is the case the defendant is liable. So the defendant is clearly responsible where the intervening causes, acts, or conditions were set in motion by his earlier negligence, or naturally induced by such wrongful act or omission, or even, it is generally held, if the intervening acts or conditions were of a nature the happening of which was reasonably to have been anticipated, though they may have been acts of the plaintiff himself." 21 Am. & Eng. Ency. Law (2d ed.), p. 490.

"To show that other causes concurred in producing or contributed to the result complained of is no defense in an action for negligence. There is, indeed, no rule better settled in the present connection than that the defendant's negligence, in order to render him liable, need not be the sole cause of the plaintiff's injuries." 21 Am. & Eng. Ency. Law (2d ed.), p. 495.

So in this case, if the negligence of the defendant so far lowered the vitality of these animals as to render them susceptible to attacks by disease, and that while in their weakened condition they were unwittingly exposed to disease by their owners in their endeavor to bring them back to a normal condition, and because of such exposure and their weakened condition, they sickened and died, the respondent's negligence

must be held to be so far a proximate cause of the injury as to render it liable for damages therefor. Whether or not the evidence justified this inference we think was a question for the jury. The evidence of the veterinary tended to show that the terrible results of the sickness of the animals was due to their lack of vitality, and this lack of vitality was clearly the result of the negligence of the respondent. We conclude, therefore, that the appellants made a *prima facie* case, and the court erred in withdrawing the case from the jury.

The court did not err in refusing to allow Victor Pierson to give his opinion as to the cause of the sickness and death of the horses. He was not shown to possess more than common knowledge on the question, and consequently was no more competent to draw a conclusion from the facts given in evidence than was the jury. The further questions discussed in the appellants' brief were not determined by the trial judge, and are not before us on this appeal.

The judgment is reversed and remanded for a new trial.

CROW, MOUNT, GOSE, PARKER, CHADWICK, DUNBAR, and MORRIS, JJ., concur.

Apr. 1909]

Opinion Per FULLERTON, J.

[No. 7644. Decided April 13, 1909.]

ERASMUS M. KING, *Appellant*, v. THE CITY OF SPOKANE,
Respondent.¹

MUNICIPAL CORPORATIONS—CLAIMS FOR INJURIES—NOTICE—SUFFICIENCY. A notice of a claim against a city, required to be given within thirty days after the accident, filed in January, 1905, and stating that the accident occurred December 27, 1905, shows with reasonable certainty that December 27, 1904, was intended, and is sufficient.

SAME—REJECTION OF CLAIM—REASONS. The reasons of the city council for rejecting a claim against the city, misdated by mistake, are immaterial.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered November 16, 1907, upon granting a nonsuit, after a trial before the court and a jury, dismissing an action against a city for personal injuries sustained through obstructions in a street. Reversed.

A. E. Barnes and *Horace Kimball*, for appellant.

L. R. Hamblen, *F. D. Allen*, and *Harry A. Rhodes*, for respondent.

FULLERTON, J.—The appellant brought this action against the respondent to recover damages for personal injuries, caused, as he alleges, by the negligence of the respondent. He was nonsuited in the court below because of a misstatement in his claim for damages, filed with the city council, and appeals from the judgment entered against him.

The charter of the city of Spokane provides that all claims for damages for personal injuries alleged to have been sustained by reason of the negligence of the city must be presented to the city council within one month after such injuries have been received; that such claim shall be in writing, and shall state the time when, and the place where, such in-

¹Reported in 100 Pac. 997.

juries were received, and the cause, nature and extent of the same, and must be verified by the claimant to be true;

“And the refusal or omission to present such claim and give notice as required, in the manner and within the time in this section required, shall be taken to and shall be, a waiver of any and all damages on account of such injuries, and shall be a bar to any suit or action against the city to recover the same or any part thereof.”

The appellant was injured on a public street in the city of Spokane. During the month of December, 1904, the city was constructing a public library, and had piled, or permitted to be piled, certain building materials, consisting of sand and gravel, on the street in front of the lot on which the building was being constructed. On the night of the injury, the material was left without being guarded by lights or barriers of any kind, and the appellant drove upon it with an open buggy, and was thrown out and injured. The accident occurred, according to his statement, on December 27, 1904. He filed a claim for damages with the city council of the city of Spokane on January 25, 1905. The claim, while seemingly regular in other respects, stated the time of the injury as December 27, 1905. After receiving the claim, the city council referred it to its finance committee, who in return referred it to the corporation counsel. That officer on July 26, 1905, returned it to the finance committee with the recommendation that the claim be disallowed, his report being as follows:

“Spokane, Washington, July 26, 1905.

“The Honorable Finance Committee of the City Council, Spokane, Washington. Gentlemen: I return herewith the claim of E. M. King for \$10,000 for alleged damages for alleged personal injuries alleged to have been received on December 27, 1905, with the recommendation that the same be disallowed. Alex M. Winston, Assistant Corporation Counsel.”

The finance committee returned the claim to the city council on August 7, 1905, with the following recommendation:

Apr. 1909]

Opinion Per FULLERTON, J.

"Spokane, Washington, August 7, 1905.

"Honorable President and Members City Council. Gentlemen: We, your Committee upon Finance, recommend that the claim of E. M. King for \$10,000 for alleged personal injuries alleged to have been sustained on December 27, 1905, near the Carnegie Library Building, on the southwest corner of First avenue and Cedar street, be disallowed, in accordance with the recommendation of the Corporation Counsel. Respectfully submitted, J. T. Snyder, Leonard Funk, Fred E. Baldwin, N. S. Pratt, Committee."

The claim was disallowed by the council on August 8, 1905, the record made then being as follows:

"13,609. Also the report recommending that the claim of E. M. King for \$10,000 for alleged personal injury alleged to have been sustained on December 27, 1905, near the Carnegie Library Building on the northwest corner of First avenue and Cedar street, be disallowed, in accordance with the recommendation of the Corporation Counsel, was adopted."

On the trial, which was being had before the court and a jury, the appellant introduced evidence tending to show the manner and circumstance of his injury, fixing the time as December 27, 1904. He then offered the claim he presented to the city council. This was objected to for the reason that it did not correctly state the time of the injury. The court overruled the objection tentatively, giving counsel an opportunity to show that the claim was not rejected for the reason that it was misdated. Counsel thereupon offered the report of the corporation counsel, the report of the finance committee, and the record entry of the city council showing the rejection of the claim. On the objection being renewed, it was sustained on the ground that the record showed that the claim was rejected because misdated, and not upon its merits as a claim against the city. The appellant thereupon offered to show, by the assistant corporation counsel and the chairman of the finance committee, that the claim was not in fact rejected because misdated, but because the corporation counsel and the finance committee did not think the claim meri-

torious. This offer was refused, whereupon the appellant, having no other evidence to show that his claim had been presented to the city council, rested his case, when a judgment of nonsuit was entered against him as before stated.

The appellant assigns as error the refusal of the court to allow the claim of damages filed with the city council to be given in evidence to the jury. The assignment we think is well taken. Unlike a notice giving a false possible date, this notice could neither mislead nor deceive. Measured from the time the claim was presented to the city council, it described the accident for which damages were claimed as having occurred eleven months in the future. A past event was stated to have occurred at a future time. When the council examined it, therefore, they knew there was a mistake either in the statement of the month and day of the month, or the year in which the accident happened. And when they remembered that a claim for damages to hold the city liable thereon had to be filed within a month after the accident happened, and that this claim was filed on January 25, 1905, they knew with reasonable certainty that the mistake was in the statement of the year, and that it was meant to be asserted that the accident happened on December 27, 1904. The council, therefore, could know with reasonable certainty that the latter was the date intended, and reasonable certainty is all that is required in the notice. The primary purpose of requirements of this character in a city charter is notice. It is not intended as a snare for the unwary, and this court has uniformly denied it this effect. *Davis v. Seattle*, 37 Wash. 223, 79 Pac. 784; *Bell v. Spokane*, 30 Wash. 508, 71 Pac. 31; *Hammock v. Tacoma*, 40 Wash. 539, 82 Pac. 893; *Born v. Spokane*, 27 Wash. 719, 68 Pac. 386.

From the recitals we have made, taken from the record, it cannot be said to clearly appear that the claim was rejected because misdated, but if this were so it would not alter the rule in the present case. Since the claim was one the council were obligated to notice, their reasons for rejecting it are not

Apr. 1909]

Opinion Per CROW, J.

material. The conclusion we have reached renders it unnecessary to discuss other questions suggested in the appellant's brief.

The judgment appealed from is reversed, and a new trial granted.

CHADWICK, CROW, MOUNT, GOSE, PARKER, DUNBAR, and MORRIS, JJ., concur.

[No. 7429. Decided April 15, 1909.]

CHARLES BAKER, *Appellant*, v. WILLIAM MOELLER,
Respondent.¹

LANDLORD AND TENANT—DANGEROUS PREMISES—INJURY TO SERVANT OF LESSEE—LIABILITY OF OWNER. The lessor of a sawmill is not liable to the employees of the lessee for injuries sustained by reason of holes in the floor, left to let sawdust and refuse drop into the waters below, where there was no covenant in the lease requiring the landlord to repair, and no concealment or fraud on his part, and he retained no control or supervision over the premises.

Appeal from a judgment of the superior court for King county, Griffin, J., entered April 6, 1907, in favor of the defendant, upon sustaining a demurrer to the amended complaint, dismissing an action for personal injuries. Affirmed.

Vince H. Faben, C. K. Poe, and S. H. Kelleran, for appellant.

Harrison Bostwick, for respondent.

CROW, J.—Action by Charles Baker against William Moeller, to recover damages for personal injuries. The trial court sustained a demurrer to the amended complaint and dismissed the action. The plaintiff has appealed.

The only question before us is whether the amended complaint states a cause of action. The appellant alleged, that the respondent owned, on the tide lands of Seattle, a build-

¹Reported in 101 Pac. 231.

ing equipped as a mill, which on August 15, 1904, he leased to appellant's employer, knowing it would be used as a saw-mill, and that workmen would be employed therein; that the building and machinery were unsafe for the purpose for which they were leased, or for any purpose where men were to move about; that the dangers consisted of exposed and unguarded holes in the floor, designedly left to let sawdust and refuse into the waters of Elliott Bay; that a dock upon which the mill was built was directly over, and a number of feet above, tide water; that sawdust and refuse were permitted to fall through the holes, and accumulate under the mill, to be washed away by the tide; that on October 5, 1904, sawdust had accumulated to such an extent as to conceal the holes; that respondent, as an employee of the lessee, then engaged in operating a sticker machine, stepped upon the sawdust obscuring one of the holes; that he lost his balance, fell against the knives of the machine, and was injured; that the machine was unguarded, old and worn; that appellant had been working upon it only about one hour; that he had no knowledge of the holes; that never before had he operated that machine or any similar machine, and that he did not know the dangers surrounding him.

The amended complaint does not state a cause of action. It makes no allegation that respondent as lessor contracted to make repairs; that he rented the building for any public use; that he caused the holes to become filled with sawdust, and obscured; that he retained control over any portion of the leased premises; that he operated or was interested in the operation of the mill; that he was guilty of fraud or deceit in making the lease; that the alleged holes and defective condition of the machinery were not apparent to the lessee; that the lessor concealed any latent defects known to him; that the lessee did not have knowledge of the condition of the mill, or that there was any contractual relation between the appellant and the respondent upon which the former could predicate a claim of negligence against the latter. Appel-

Apr. 1909]

Opinion Per CROW, J.

lant entered upon the premises only as employee of the lessee. He was in no better position to maintain an action for damages than his employer would have been if injured. As far as the respondent's liability is concerned, appellant entered under the same title and assumed the same risks as the lessee.

"In the absence of covenant on the part of the landlord to repair, no active duty is imposed on him to disclose apparent defects which are equally within the knowledge of the tenant, or which the latter might ascertain by due diligence, the rule of *caveat emptor* applying in such cases with full force; and in such cases the landlord is not liable for subsequent injuries resulting from such defects." 24 Cyc. 1114, and cases cited.

It is true that the same text announces the further rule that, in the absence of an express contract to repair, a lessor who leases property with knowledge of latent defects which he conceals from the lessee is liable for injuries resulting to the lessee by reason of such defects. But no such doctrine is applicable here, as appellant has failed to plead any latent defects or their concealment by the lessor. The lessee knew as much about the defects as did the respondent. Appellant's employer leased, accepted, and used, the premises with knowledge of the defects, which, to him at least, were open and apparent. He could not, under such circumstances, recover damages from the lessor for injuries sustained by reason of the defective condition of the premises.

"The general rule is that where a tenant has knowledge of the defective condition of the premises, and continues thereafter to use or occupy the same, he is presumed to assume the risk, and in case of injury resulting from such defects he is held to be guilty of contributory negligence, and hence cannot recover therefor." 24 Cyc. 1121, and cases cited.

No contractual relation having existed between the appellant and the respondent, and appellant having entered upon the premises only as the servant of the lessee, his right to recover against the respondent is in no manner superior to that of his employer.

contract was entered into, it was agreed orally between plaintiff and Spear that the payment of \$7,000 for the aforesaid work should be made by the conveyance by plaintiff to Spear of a Seattle tide land lot, which lot was conveyed on the 19th day of October by plaintiff to Spear, in full satisfaction, and in liquidation, of the contract price agreed by him to be paid to Spear as aforesaid.

Prior to the execution of the said contract, plaintiff demanded of Spear a bond of insurance for the faithful performance of the contract, which Spear agreed to furnish, and in consideration of such promise the said building contract was executed. On the 9th day of November, 1906, Spear furnished plaintiff with such bond in the sum of \$7,000, with the defendant the Aetna Indemnity Company as surety or guarantor thereon. Spear worked but a short time on the building, when he voluntarily abandoned his contract, and neglected to pay for any labor or material used in the construction so far as he carried it. The defendant the Aetna Indemnity Company was duly notified of Spear's abandonment, but neglected and refused to exercise its option to complete the building as provided in the bond. By reason of Spear's abandonment, certain liens for material were filed against the building, which the plaintiff had to pay, and he brought this action against the contractor Spear and the indemnity company to recover the damages alleged. Spear did not answer, the only party being the Aetna Indemnity Company, which denied the allegations of the complaint and denied liability under the bond. Upon the trial of the action, after the plaintiff had introduced his proof, defendant the Aetna Indemnity Company moved for judgment of nonsuit, which was granted by the court. Judgment was entered, and appeal followed.

The court found the parol agreement in relation to the liquidation of the contract by the sale of the lot mentioned above; that Spear had agreed to furnish said bond, and did furnish the same through the respondent, the Aetna In-

Apr. 1909]

Opinion Per DUNBAR, J.

demnity Company. This bond is too long to be reproduced here, but it is the ordinary bond in such cases. [The contention of the respondent is that there was a change made in the contract which releases the guarantor from any liability, viz., that the contract, in legal contemplation, provided for the payment for the buildings when the labor was completed, and that in fact the contract price had been paid before the building was commenced. It is the contention of the respondent that the law reads into contracts of this kind, where no time is mentioned for payment, the stipulation that the payment is to be made upon completion of the work, and it cites several cases to sustain that contention.

An examination of those cases satisfies us that they are not applicable to this kind of a case. They are all cases between the contractor and the builder or laborer, and no guarantor's rights are involved in any of them; and the rule as laid down by those cases would have to be extended to hold with respondent's contention in this regard. It is a dangerous thing to read too many things into a contract that are not placed in the contract by the parties to it. Of course, it is the universal law that the statutes and laws governing citizens in a state are presumed to be incorporated in contracts made by such citizens, because the presumption is that the contracting parties know the law. But this is altogether a different proposition from reading into a contract conditions which are not a part of the law of the country, and are not necessarily within the contemplation of the parties to the contract when the same is executed. The appellant, on the other hand, cites two cases, viz., *Reed v. McGregor*, 62 Minn. 94, 64 N. W. 88, and *Miller v. Eccles*, 155 Pa. St. 36, 25 Atl. 776, where the rule is squarely announced that, if a building contract providing for a round sum does not stipulate for the time when payment shall be made, the guarantor of the contract is not discharged by the owner making payments to the contractor as the work progresses and before it is completed.

But there is another proposition which, it seems to us, is fatal to appellant's right to recover in this case. The bond which was given to appellant by the respondent, among other things, provides as follows:

"The said obligee shall retain the last payment and reserve due said principal until the complete performance by said principal of all the terms, covenants and conditions of the contract on said principal's part to be performed, and until the expiration of the time within which liens or notices of liens may be filed, by reason of anything done in or towards the performance of said contract, and until the cancellation and discharge of such liens, if any, and said surety shall be notified in writing before said last payment shall be made or said reserve paid."

There was a contractual relation existing by reason of this bond between the indemnity company and the appellant. This provision was accepted by the appellant when he accepted the bond as a specification of his duties in the premises; and it seems to us that it was a fraud upon the indemnity company to neglect to notify it that a payment had been made which was not disclosed in the contract upon which the bond was given, and the making of which rendered unavailing the provision in the bond just quoted. Having accepted the bond with a provision of this kind, we think the appellant is bound by such provision.

The judgment will therefore be affirmed.

CROW, MOUNT, CHADWICK, GOSE, and FULLERTON, JJ.,
concur.

PARKER and MORRIS, JJ., took no part.

Apr. 1909]

Citations of Counsel.

[No. 7766. Decided April 17, 1909.]

MAURICE WINDMILLER, *Appellant*, v. NORTHERN PACIFIC
RAILWAY COMPANY, *Respondent*.¹

CARRIERS—OF GOODS—LOSS IN TRANSIT—CONTRACT—RELEASED VALUE—LIABILITY FOR THEFT. Where, in order to secure a lower rate, a shipper of a case of furs, valued at \$3,000, enters into a contract to release the value to \$1 per pound, the carrier is not liable in excess of the released value for loss in transit, evidently by theft, on the theory that the theft must have been committed by an employee of some connecting carrier, for which the initial carrier would be responsible.

Appeal from a judgment of the superior court for King county, Yakey, J., entered July 23, 1908, upon findings favorable to defendant, after a trial before the court without a jury, in an action for the loss of furs shipped by plaintiff over defendant's railway. Affirmed.

Peters & Powell and *Marion Edwards*, for appellant, contended, *inter alia*, that a carrier cannot secure exemption from gross negligence or wilful misconduct by stipulation in the contract of carriage as to the value of the thing shipped. *Georgia Pac. R. Co. v. Hughart*, 90 Ala. 36, 8 South. 62; *Chicago & N. W. R. Co. v. Chapman*, 133 Ill. 96, 24 N. E. 417, 23 Am. St. 587, 8 L. R. A. 508. In conversion, after demand, the burden of proof is upon the carrier to prove that it was not guilty of negligence, and released value stipulations are of no avail. *Bird v. Georgia Railroad*, 72 Ga. 655; *Savannah etc. R. Co. v. Sloat*, 93 Ga. 803, 20 S. E. 219; *Central of Georgia R. Co. v. Chicago Portrait Co.*, 122 Ga. 11, 49 S. E. 727, 106 Am. St. 87; *Georgia Southern etc. R. Co. v. Johnson, King & Co.*, 121 Ga. 231, 48 S. E. 807; *Southern Express Co. v. Newby*, 36 Ga. 635, 91 Am. Dec. 788; *Read v. St. Louis etc. R. Co.*, 60 Mo. 199; *Western Transp. Co. v. Newhall*, 24 Ill. 466; *Johnson v. Alabama etc. R. Co.*, 69 Miss. 191, 30 Am. St. 534. The burden is

¹Reported in 101 Pac. 225.

upon the carrier to bring the loss within the exception of the contract. *Southern Express Co. v. Newby*, *supra*; *Propeller Niagara v. Cordes*, 21 How. 7, 16 L. Ed. 41; *Toledo etc. R. Co. v. Hamilton*, 76 Ill. 393; *The Warren Adams*, 74 Fed. 413; *Cooper v. Raleigh etc. R. Co.*, 110 Ga. 659, 36 S. E. 240; *Parker v. Atlantic Coast Line R. Co.*, 133 N. C. 335, 63 L. R. A. 827. Exemption from negligence must be expressly provided for in the contract. *Canfield v. Baltimore etc. R. Co.*, 93 N. Y. 532, 45 Am. Rep. 268; *Mynard v. Syracuse etc. R. Co.*, 71 N. Y. 180, 27 Am. Rep. 28; *Blum v. Monahan*, 36 Misc. Rep. 179, 73 N. Y. Supp. 162; *Bermel v. New York etc. R. Co.*, 62 App. Div. 389, 70 N. Y. Supp. 804, *Id.*, 65 N. E. 1113; *Doyle v. Baltimore etc. R. Co.*, 126 Fed. 841; *United States Lace Curtain Mills v. Oceanic Steam Nav. Co.*, 145 Fed. 701; *Kansas City etc. R. Co. v. Simpson*, 30 Kan. 645, 2 Pac. 821, 46 Am. Rep. 104; *Central of Georgia R. Co. v. Hall*, 124 Ga. 322, 52 S. E. 679, 110 Am. St. 170; *Moulton v. St. Paul etc. R. Co.*, 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781; *United States Express Co. v. Backman*, 28 Ohio St. 144; *Georgia Southern etc. R. Co. v. Johnson, King & Co.*, *supra*; *Kansas City S. R. Co. v. Embrey*, 76 Ark. 589, 90 S. W. 15. The burden of proving the reasonableness and the fairness of a contract restricting the carrier's liability is on the carrier. *Louisville & N. R. Co. v. Gilbert*, 88 Tenn. 430, 12 S. W. 1018, 7 L. R. A. 162; *Murphy v. Wells-Fargo & Co. Express*, 99 Minn. 230, 108 N. W. 1070. A released valuation clause must be upon a *bona fide* valuation to relieve from liability for negligence. *Hutchinson, Carriers*, §§ 425, 431; *Georgia R. & Banking Co. v. Keener*, 93 Ga. 808, 21 S. E. 287, 44 Am. St. 197; *Southern R. Co. v. Jones*, 132 Ala. 437, 31 South. 501; *Murphy v. Wells-Fargo & Co. Express*, *supra*; *Alair v. Northern Pac. R. Co.*, 53 Minn. 160, 54 N. W. 1072, 39 Am. St. 588, 19 L. R. A. 764; *Douglass Co. v. Minnesota Transfer R. Co.*, 62 Minn. 288, 64 N. W. 899, 30 L. R. A. 860; *St. Louis etc. R. Co. v. McIntyre* (Tex. Civ. App.), 82 S. W. 346; *Georgia Pac. R. Co. v. Hughart*, *supra*; *Nashville etc. R.*

Apr. 1909]

Opinion Per DUNBAR, J.

Co. v. Stone & Haslett, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. 955; *Everett v. Norfolk etc. R. Co.*, 138 N. C. 68, 50 S. E. 557, 1 L. R. A. (N. S.) 985.

Carroll B. Graves, for respondent.

DUNBAR, J.—On May 10, 1905, appellant shipped from Seattle, over respondent's railroad and connecting lines, a case of furs, of the real value, as appellant contends, of \$3,111. Upon delivery to the carrier, the value was stated by appellant at \$3,000. The freight demanded was something over \$30. Appellant, deeming this unreasonable, remonstrated, and the respondent offered to carry the goods to New York for \$5.05, if appellant would release the value to one dollar per pound. Appellant elected to do this, and a bill of lading was issued upon which was written the stated value \$3,000, and the words "release to value of one dollar per pound." When the case arrived at New York and was about to be delivered, it was discovered that it had been tampered with. Thereupon the case was opened in the presence of the agent's last connecting carrier and the representatives of the consignee, and it was found that the furs, to the value of \$1,920 as appellant claims, had been abstracted, and in their place had been substituted nineteen copies of *Everybody's Magazine*. The case with the magazines weighed at New York one hundred and sixty pounds; without the magazines, one hundred and thirty-seven pounds. Upon the respondent's way bill the weight was stated at one hundred and twenty pounds. Respondent made no explanation, at the time of the discovery of the loss, or afterwards, as to the cause or manner of the loss. The appellant was the owner of the goods, at the time of their shipment and during transportation. The respondent in transporting the furs delivered the same to its connecting carrier, Minnesota Transfer, at St. Paul, and the connecting carrier noted no exception as to the condition of the case. The respondent's regular tariff for carrying dry skins, such as those involved in this action,

provides for the addition to the rate, based on the value of \$1 per pound, of one and one-fourth per cent of the additional valuation, unless the shipper releases the value of the goods to \$1 per pound. This is appellant's statement of the case, and is in substantial accord with the findings of the court.

The appellant sued respondent, claiming compensation for the actual value of the goods lost. The case was tried by the court without a jury, and after findings of fact, the conclusion of law announced was that the appellant was entitled to recover on account of the loss of furs referred to in the findings of fact and of the estimated weight of fifty pounds, in the sum of \$50 and the costs of suit. From this judgment this appeal is taken.

There is no contention on the part of the respondent that the company was not responsible for the amount found by the court, viz., \$1 per pound for the goods that were lost, and while the discussion in appellant's brief takes a somewhat broad range, there is really only one question involved in the case, viz.: Is appellant entitled to recover the actual value of his goods lost, or only the released value of \$1 per pound? It is the contention of the appellant in this case that it plainly appears from the testimony that the furs were lost by theft, and that the only reasonable inference of fact is that the theft was by some one in the employ of one of the respondent's connecting carriers; and that, under such circumstances, the appellant is not bound by the contract which he made with the carrier. Appellant cites *Allen & Gilbert-Ramaker Co. v. Canadian Pac. R. Co.*, 42 Wash. 64, 84 Pac. 620, to sustain the rule that, under the law of this state, an initial carrier is responsible for the acts of the connecting carriers and their servants. While that doubtless is the rule, the responsibility of the carrier is confined to its contract. It may be conceded that it is the law of this state that the respondent's liability extends to the acts of the connecting carriers; but, conceding this, there still remains the vital question of what the responsibility is under the contract.

Apr. 1909]

Opinion Per DUNBAR, J.

This case, it seems to us, falls squarely within the rule announced by this court in *Hill v. Northern Pac. R. Co.*, 33 Wash. 697, 74 Pac. 1054, where it was held that, where a contract of carriage signed by the shipper is fairly made with a railroad company, agreeing on a valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight it receives, and of protecting itself against extravagant and fanciful valuations. This case was based upon the case of *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, where the same doctrine was announced. That case involved a shipment of horses. A contract was made with the railroad company releasing valuation to a certain value. During the transit, one of the horses was killed and others were injured, and suit was brought for the full alleged value of the horses; and the court held that the shipper would be bound by the conditions of his contract, saying:

"The presumption is conclusive that, if the liability had been assumed on a valuation as great as that now alleged, a higher rate of freight would have been charged. The rate of freight is indissolubly bound up with the valuation. If the rate of freight named was the only one offered by the defendant, it was because it was a rate measured by the valuation expressed. If the valuation was fixed at that expressed, when the real value was larger, it was because the rate of freight named was measured by the low valuation. The plaintiff cannot claim higher valuation, on the agreed rate of freight."

In the case at bar there is no room for presumption. It is conceded that if the liability had been assumed on the full valuation of the furs shipped, a higher rate of freight would have been charged. Nor is this a case where a contract is hurriedly forced upon a shipper or where the conditions relied upon are written in small type in long and involved

contracts where there is a serious question concerning the knowledge of the shipper as to the stipulations therein contained, because in this case the matter was discussed with the agent of the railroad company. The trusted agent of the shipper, who conveyed the goods to the depot, believing that the rate was higher than his principal would desire to pay, refused to pay the freight, and informed the appellant of the amount charged. The appellant then had a conference with the carrier, and was informed that the only way that he could escape paying the full shipping value was by a release of the value to \$1 per pound; and the contract was then made between the appellant and the carrier that such should be the contracted value of the goods.

It can readily be seen that the principle contended for by the respondent is not an equitable one, because if the goods had been carried through safely he would have received the benefit of the contract which he entered into for a lower price. But the venture having failed, he does not now wish to accord to the carrier the benefit which accrued to it by reason of this release contract. In other words, he reaps the benefit of the contract if there is no loss, and the carrier is made responsible for the whole value if there is a loss. The reason for sustaining a contract of this kind is pointedly expressed by the supreme court of the United States in *Hart v. Pennsylvania R. Co.*, *supra*, in the following language:

"The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier a measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value."

True, it must be that it exacts from the carrier the measure of care due to the value agreed on, and that is the essential

Apr. 1909]

Opinion Per DUNBAR, J.

idea in the transaction. It is nothing more than fair to the carrier that it should be aware of the value of goods taken in charge by it, so that it may be on its guard to exercise the measure of care due to the value agreed on. For instance, if a box of jewels of great value were shipped with the full value specified, it would be reasonable to suppose that the carrier would exercise greater care in looking after such goods than it would in looking after a cargo of wool or some cheaper material, where the responsibility would be small in comparison, in case of a loss. These questions were all discussed in *Hill v. Northern Pac. R. Co.*, *supra*. Some of the cases cited by the appellant, and many others involving the same principle, were considered by the court in that case, and we are unable to distinguish in any important particular the difference in principle between that case and this, and are inclined to sustain the decision there announced.

There are some other questions raised by appellant in his brief, but as we view the case, under the undisputed testimony and findings of fact, it would be impossible for the appellant to recover a greater judgment than he did recover, and the judgment will therefore be affirmed.

CROW, MOUNT, CHADWICK, GOSE, and FULLERTON, JJ.,
concur.

PARKER and MORRIS, JJ., took no part.

[No. 7579. Decided April 19, 1909.]

SPRINGFIELD SHINGLE COMPANY, *Respondent*, v. EDGEComb
MILL COMPANY, *Appellant*.¹

APPEARANCE—WHAT CONSTITUTES—ANSWER. An answer reciting that "now comes the defendant" and alleging facts as a "full and complete and affirmative defense," constitutes a general appearance.

APPEAL—REVIEW—PROCESS—WAIVER OF SERVICE BY GENERAL APPEARANCE. Error assigned on the denial of a motion to quash service of a summons, is waived by a general appearance and pleading over to the merits.

APPEAL—PRESERVATION OF GROUNDS—AMENDMENT OF PLEADINGS—OBJECTIONS. Error cannot be predicated upon a verbal amendment to the complaint read into the record at the opening of the trial, allowing a larger recovery, where no objection was made in the court below.

APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. Error on the admission of evidence is harmless on a trial *de novo* on appeal.

APPEAL—REVIEW—FINDINGS. The findings of the trial judge upon evidence that is very conflicting will seldom be disturbed on appeal, where he had opportunities of determining the credibility of the witnesses not possessed by the appellate court.

SALES—QUALITY—EVIDENCE—SUFFICIENCY. Findings that shingles were sold as of "Star A Star" grade, are sustained where the parties contradicted each other, but they were branded, shipped and billed as such, and the price paid was the then ruling market price for that grade.

SALES—DAMAGES—CONDITION BROKEN—QUALITY—CAVEAT EMPTOR. The principle of caveat emptor does not apply where shingles are sold as "Star A Star," a grade well known to the trade and by custom conforming to certain specifications; and if not up to grade, the vendee may recover his damages, as for condition broken, although he inspected or had opportunity to inspect them before the sale.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered May 4, 1908, upon findings in favor of the plaintiff, in an action for damages for

¹Reported in 101 Pac. 223.

Apr. 1909]

Opinion Per MORRIS, J.

condition broken as to the quality of shingles sold and delivered by the defendant. Affirmed.

Merrick & Mills, for appellant.

J. Y. Kennedy and *Hathaway & Alston*, for respondent.

MORRIS, J.—This action was commenced to recover damages claimed to have been sustained in the sale of a quantity of shingles. The defendant was served by publication, following the usual return of “not found,” and affidavit of “non-residence.” Thereafter the defendant, appearing specially, moved to quash the service, which motion was, on February 13, 1908, denied, and on February 20, defendant filed its answer. The first error assigned is the denial of the motion to quash the service.

The answer reads, in part, as follows: “Now comes the defendant above named and, for answer to the complaint of the plaintiff above named, . . .” The answer then proceeds to frame an issue by denying the allegations of the complaint, and continues: “and for a full and complete and affirmative defense to all the matters and things in said plaintiff’s complaint set out, this defendant avers. . . : .” This answer was an undoubted general appearance and plea to the merits. Appellant, having submitted itself to the jurisdiction of the court, and formally entered its plea to the merits, cannot now be heard to question the character of the service upon it.

The respondent having replied to the answer, the case was in due time called for trial before the court without a jury; whereupon counsel for respondent thus addressed the court: “We desire to amend paragraph VII of the complaint to read as follows.” The amendment was then read into the record *in haec verba*. No objection was made by appellant, and no ruling appears to have been made by the court. Counsel for respondent called his first witnesses, and the case proceeded. Paragraph VII of the complaint alleged the value of the shingles delivered to respondent as \$1.30 per thousand;

the amendment alleged the value to be seventy cents per thousand, so that the purpose and effect of the amendment was to lessen the value of the shingles delivered and increase the damages, if any, sustained by respondent. The court, in its findings of fact, fixed the value of the shingles at eighty cents per thousand, and gave judgment to respondent in the sum of \$664.88, which was a larger sum than the damages demanded in the original complaint, in which the value was fixed at \$1.30 per thousand, making the damages correspondingly less. It is apparent from the record that all parties treated the amendment as duly made. Respondent now assigns error in this connection. Respondent, having made no objection in the court below, can make none here, and will be held to have waived any objection to the amendment as proposed. Objections to be available upon appeal must be well and seasonably made to the trial court, so that the error, if any, may be corrected in the first instance.

Next we have assignments of error growing out of admission of evidence. "Whether erroneous evidence has been admitted is not very material, since the court will disregard it and review the facts upon the evidence legitimately within the record." *Carney v. Vogel*, ante p. 571, 100 Pac. 1027.

We now come to the assignment of error upon which appellant most strongly relies. As before intimated, the action was one to recover damages upon the sale and delivery of certain shingles. The complaint proceeds upon the theory that the appellant was the owner of a quantity of cedar shingles, known to the trade as "Star A Star;" that the appellant sold, and the respondent purchased and paid for, these shingles as "Star A Star" shingles, at the then market price of \$2.95 per thousand; that the appellant warranted the shingles to be of the aforesaid grade, and the respondent, relying upon such warranty, purchased them for the then market price of shingles of that brand or grade; that the shingles so sold were not "Star A Star," but turned out to be an inferior grade of much less value, not worth to

Apr. 1909]

Opinion Per MORRIS, J.

exceed (as amended) seventy cents per thousand. These allegations were denied by appellant in its answer, and it was affirmatively alleged that no representations were made as to the quality or grade of the shingles, and that respondent purchased after inspection. Thus it will be seen that the real issue before the court was whether the sale was made upon a condition in the nature of a warranty, or whether the principle of *caveat emptor* applies. The court found for the plaintiff, and defendant appeals.

It appears from the evidence, and the court found, that "Star A Star" was a brand of shingles of superior grade, generally manufactured in this state, and that it was a custom established among shingle manufacturers to have such shingles conform to certain specifications, and that when shingles were stamped and packed as "Star A Star," such label indicated that the shingles came up to and fully met the specifications required. Mr. Gampp, manager of the respondent, testified that, on August 20, 1907, he went to Edgcomb to purchase shingles; that he there saw Mr. Gray and Mr. Kinnear, officers of the defendant company, and purchased from them a car load of "Star A Star" shingles, at \$2.95 per thousand, his company to receive the underweight, which was then estimated at ten cents per thousand; that he did not examine the shingles, except that he and Mr. Gray went out to the car which was then being loaded, and took out two or three bunches to weigh them for the purpose of ascertaining the probable underweight; that when he first saw Mr. Gray, he said to him that he wanted to buy a car of "Star A Star" shingles, and that Gray replied "they had some to sell;" that nothing more was said as to the grade of the shingles, and the only other conversation was as to the price, underweight, and shipping directions. Mr. Kinnear testified that Gampp inquired as to the grade of the shingles, and that he was told "to go out and examine them;" that he did examine them, and said they were all right. He further testified:

"Q. What kind of shingles did you make in that mill? A. Star A Star. . . . Q. How did the shingles in the car you sold Gampp compare as to quality with the average red cedar shingles manufactured here on the Sound under the brand 'Star A Star' shingles? A. They averaged very favorably with any that is manufactured."

Mr. Gray testified: "Q. What were those shingles as to grade? A. The kind? Q. Yes, sir. A. They were Star A Star shingles;" and that, when Gampp suggested the shingles might not be up to grade, "I says, we will go out and inspect them;" and that Gampp did go out and examine them.

Mr. Kuhn, a witness for appellant, testified he heard the conversation between Gampp, Kinnear and Gray, and that "there was nothing said about the grade or quality in my hearing." It will thus be noted that the evidence was very conflicting as to the conversation relative to the grade of shingles. This court has, however, frequently said in such cases that the trial judge, having seen the witnesses, noted their demeanor upon the stand, and being in a position to apply other rules and tests for determining the credibility of witnesses, his findings based upon such evidence will seldom be disturbed. We, therefore, approach the determination of the legal question involved herein with the finding that the shingles were sold and purchased as "Star A Star" shingles. We are further strengthened in this view by the testimony of both Kinnear and Gray, that the shingles were "Star A Star;" that they were branded, shipped and billed as such, and that the price asked and obtained was the then ruling market price for "Star A Star" shingles. It would not require a very vivid imagination under these circumstances to hold that they were sold as "Star A Star."

There was, as we have seen, no express warranty of quality, and it is contended by appellant that there could be no implied warranty in that respondent had an opportunity to inspect the shingles and that the maxim "*caveat emptor*" applies, and cites as its main reliance for the application of a

Apr. 1909]

Opinion Per MORRIS, J.

like rule here, the cases of *Swett v. Colgate*, 20 Johns. (N. Y.) 196, 11 Am. Dec. 266, and *Seixas v. Woods*, 2 Caines (N. Y.) 48, 2 Am. Dec. 215. *Swett v. Colgate* was a sale at auction of goods advertised and sold as *barilla*, when in fact it was *kelp*, a much inferior article; and the court held there was neither express warranty nor fraud, and the principle of *caveat emptor* applied; following the case of *Seixas v. Woods*, which was a case where wood was advertised and sold as *braziletto*. The agent of the vendee saw the wood, but it turned out to be an inferior wood, known to the trade as *peachum*, and *caveat emptor* was applied. These are the strongest cases cited in appellant's brief. Other cases are referred to, but they are cases coming within the undoubted rule of *caveat emptor*, and are in no wise analogous. These two cases, as we shall hereafter see, have both been criticized by the New York court, and are not now regarded as authority in that state.

There can be no question of *caveat emptor* in this case, for the reason that this rule applies where it is sought to enforce an implied warranty of quality or soundness, and the buyer has had opportunity of inspection. It is not claimed that there was any implied warranty of quality in the case at bar. The action is not brought upon any theory that the shingles were not good, sound, merchantable shingles, or that the timber in them was dead, rotten, or of any other unsound quality. But the theory of this case is that the sale of an article as being of a particular description does imply a contract that the article sold is of that description, a doctrine that is supported by abundant authority, both in this country and in England; and this rule is founded, not upon any theory of warranty, either express or implied, but rather upon the theory of condition broken; and if the action be one brought by the vendor to recover the price of the article sold, the tender of an article answering the description is a condition precedent to the recovery; and if this condition be not performed, the vendee is entitled to reject the article, or

if he has paid for it, to recover back his money. An examination of the English cases creates some confusion, because of the inapt use of the term "warranty" in this connection. Lord Abinger, in the case of *Chanter v. Hopkins*, 4 M. & W. 399, in speaking of this complexity, says:

"A good deal of confusion has arisen in many of the cases on this subject, from the unfortunate use made of the word 'warranty.' Two things have been confounded together. A warranty is an express or implied statement of something which a party undertakes shall be part of a contract; and though part of the contract, yet collateral to the express object of it. But in many of the cases, some of which have been referred to, the circumstance of a party selling a particular thing by its proper description, has been called a warranty, and the breach of such a contract, a breach of warranty; but it would be better to distinguish such cases as a noncompliance with a contract which a party has engaged to fulfill."

That the same perplexity exists in the American cases is referred to by Mr. Chief Justice Peters, in *Morse v. Moore*, 83 Me. 473, 22 Atl. 362, 23 Am. St. 783, 13 L. R. A. 224, in saying:

"That there is a warranty or a condition precedent amounting to warranty in the contract, there can be no doubt. Such a warranty will be found to be variously characterized in the books, as executory warranty,—a condition precedent amounting to warranty,—in the nature of warranty,—with the effect of warranty,—equal to warranty, and the like. It is immaterial for present purpose whether it be regarded as an express warranty or an express condition implying warranty, as the effect must be the same. One kind within its limit is not a more potential ingredient in a contract than the other, the difference between them being only in the style of agreement to which they may be annexed. An express warranty may be also special, however. It is now well settled by the authorities generally, our own cases included, that a sale of goods by a particular description of quality imports a warranty that the goods are or shall be of that description; a warranty which becomes a part of the contract."

Apr. 1909]

Opinion Per MORRIS, J.

In this case the contract called for "good, clear, merchantable ice," and it was held to be a sale of a particular description or kind of ice, amounting to an express warranty.

Before reviewing other American cases, reference will be made to a few of the English cases in which the rule here contended for has been announced. In *Tye v. Fynmore*, 3 Camp. 462, the article was sold as "fair, merchantable sassafras wood." The defense was that the sassafras wood delivered was part of the timber, while in the trade, by the description made use of, was meant the roots of the sassafras tree. It further appeared that the buyer was a druggist well skilled in matters of this sort; that the day before the contract was entered into a specimen of the wood was exhibited to him; and that he had a full opportunity to examine it. Lord Ellenborough held that it was not a sale by sample; the question was whether it was in the understanding of the trade "fair, merchantable sassafras wood;" and that it was immaterial that the buyer was a druggist and skilled in medicinal woods. He was not bound to exercise his skill, but could rely upon the contract as to the quality of the commodity.

So, in the case before us, it was shown that "Star A Star" was a well defined term when applied to shingles; that it meant shingles not only of a certain quality or grade, but of fixed dimensions, and that the term was well understood among shingle men. The respondent, although shown to have been familiar with the different grading of shingles and to have inspected some of the bunches, was, in the language of Lord Ellenborough, "not bound to exercise his skill, having an express contract from the vendor as to the quality of the commodity."

In the case of *Bridge v. Wain*, 1 Stark. 504, the goods sold were described in the invoice as "scarlet cuttings." The evidence showed the term "scarlet cuttings" was understood in the trade to mean cuttings of cloth only, without any mix-

ture of other material. No special warranty was claimed. Lord Ellenborough said:

"If they were sold by the name of scarlet cuttings, and were so described in the invoice, an undertaking that they were such must be inferred. To satisfy an allegation, that they were warranted to be of any particular quality, proof must be given of such a warranty, but a warranty is implied that they were that for which they were sold."

In the case before us, the shingles were billed to Gampp as "Extra Star A Star red cedar Shgs.," and in the bill of lading the description was "1239 pkg. Shingles E. Star A Star red cedar." It would seem that, being billed and shipped as "Star A Star," it would imply the same condition as in the case just quoted from; that they were sold as "Star A Star," and were that for which they were sold.

In *Shepherd v. Kain*, 5 B. & Ald. 240, a ship was advertised for sale as "a copper fastened vessel to be taken with all faults, without any allowance for any defects whatsoever." Held, that the seller would not be responsible for any faults or defects which a copper fastened vessel might have, but that it must be as described—"a copper fastened vessel."

In *Mader v. Jones*, 1 Russell & Chesley (Nova Scotia) 82, a quantity of fish, packed in barrels branded "Gulf Herring split No. 1," were sold. Before purchasing, the buyer opened and examined a few barrels. The evidence showed the fish did not correspond with the brand. Held: "Where goods are sold under a certain denomination, the buyer is entitled to have such goods delivered to him as are commercially known under this denomination, though he may have bought after inspection of the bulk and without warranty;" citing *Josling v. Kingsford*, 13 C. B. (N. S.) 447, and Addison on Contracts (ed. of 1869), p. 211.

Referring now to the New York cases, we shall see, as before intimated, that the cases of *Seixas v. Woods*, *supra*, and *Swett v. Colgate*, *supra*, upon which appellant most strongly relies, are not now recognized as announcing the true doc-

Apr. 1909]

Opinion Per MORRIS, J.

trine in that state. The first case criticising the rule laid down in those two cases is *Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. Rep. 595, where the article was sold at auction, as "blue vitriol." It turned out to be "salzburger vitriol," a much inferior grade. It was held that the offering for sale as "blue vitriol" constituted a warranty. Earl, C., in delivering the opinion of the court, says:

"The case of *Seixas v. Woods* (2 Caines 48) seems to have been decided mainly upon the authority of *Chandelor v. Lopus* (Cro. Jac., 4). . . . The rule, as thus laid down, has been thoroughly overturned since the courts hold that any positive affirmation or representation as to the character or quality of an article sold may constitute a warranty. The case has been much questioned, and can no longer be regarded as authority for the precise point decided [citing 2 Kent's Com. (Comstock's ed), 683, and other cases.]. . . . The case of *Swett v. Colgate* (20 John., 196) is quite analogous to the case of *Seixas v. Woods*, and was decided mainly upon the authority of that case. . . . but in view of the rules of law, as now settled in this and other states, I am of opinion that the law was not properly applied to the facts."

The point was next before the New York court in the case of *Dounce v. Dow*, 64 N. Y. 411, where the article sold was described as "XX pipe iron." Held, there was a warranty of the character of the iron as "XX pipe iron," the holding being largely based upon *Hawkins v. Pemberton*, *supra*. The same point again came before the court of appeals of New York in the case of *White v. Müller*, 71 N. Y. 118, 27 Am. Rep. 13. The article there sold was described as "Large Bristol Cabbage." Held, an implied warranty that the seed sold was of that character and variety. Mr. Justice Andrews, in the opinion of the court, says:

"The doctrine that a bargain and sale of a chattel of a particular description imports a contract or warranty that the article sold is of that description, is sustained by a great weight of judicial authority. The cases of *Seixas v. Woods* (2 Caines, 48), and *Swett v. Colgate* (20 J. R., 196), based mainly upon the authority of the case of *Chandelor v. Lopus*

(Cro. J., 4), are, it must be admitted, adverse to this view. The case of *Chandelor v. Lopus* has been overruled in England, and the cases in this state referred to have been often questioned, and Chancellor Kent, who took part in deciding *Seixas v. Woods*, intimates in his commentaries a doubt whether the case was correctly decided. (2 Kent. 479). . . . We think the modern doctrine upon the subject is reasonable, and proceeds upon a just interpretation of the contract of sale. A dealer who sells an article describing it by the name of an article of commerce, the identity of which is not known to the purchaser, must understand that the latter relies upon the description as a representation by the seller that it is the thing described; and this constitutes a warranty."

We next refer to cases from other states, to show that the rule of the English and New York courts has become the settled American rule. In *Flint v. Lyon*, 4 Cal. 17, the sale was of "Haxall" flour; it turned out to be "Gallego" flour, it further being shown there was no difference in the value of "Gallego" and "Haxall" flour. Held, the use of the word "Haxall" amounted to a warranty that the flour was Haxall. In *Peckham v. Davis*, 93 Ala. 474, 9 South, 509, the article sold was a "soda water apparatus with safety valves." The article delivered had no safety valves, and although it appeared that safety valves were not indispensable to the efficiency of such apparatus, it was held to be an implied warranty that the apparatus had safety valves attached.

"If not a warranty strictly speaking, but a condition, as held by some authorities, failing to answer the description, it is not the thing purchased, and the buyer has the right to return the article."

In *Wolcott, Johnson & Co. v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438, the article sold was "early strap-leaved red-top turnip seed." The seed was shown to the buyer. It turned out to be another kind of turnip seed. The court says:

"The doctrine that on the sale of a chattel as being of a particular kind or description, a contract is implied that the

Apr. 1909]

Opinion Per MORRIS, J.

article sold is of that kind or description is also sustained . . . whether the action shall be technically considered an action on a warranty, or an action for the nonperformance of a contract, is entirely immaterial."

In *Whitaker v. McCormick*, 6 Mo. App. 114, the article sold was described as "No. 2 white mixed corn." Nothing was said about a warranty. The testimony showed, as in the case at bar, that the term "No. 2 white mixed corn" was specifically descriptive of a particular grade. Held, an implied guaranty that the article sold, when delivered, shall be of the particular description. In *King v. Rochester*, 67 N. H. 310, 39 Atl. 256, the articles sold were valves of a certain pattern manufactured at Boston. Valves of a similar character manufactured at Pittsburg were furnished, which was shown to be of equal value and usefulness. Held, that the buyer was not bound to accept them. In *Columbian Iron Works v. Douglas*, 84 Md. 44, 34 Atl. 1118, 57 Am. St. 362, 33 L. R. A. 103, the article contracted for was steel scrap consisting of clippings from the steel plates of cruisers built by defendant for the United States navy. Seventy tons of the delivered scrap were not such clippings. The opinion of the court reads in part as follows:

"The substitution of any other or different material, no matter what its quality or chemical test might be, was a clear breach of the undertaking entered into by the parties. When a person buys a particular thing he cannot be compelled to take some other thing, even if like the thing he bought. He has a right to insist on the terms of his contract. If he has unwittingly received that which he has not bought he has the right to return it, or, keeping it, to recoup when sued for the stipulated price, the damages which a failure to comply with the contract has caused him; or, finally, if he has paid the purchase price he has the legal right to sue for and to recover back the difference in value between the price which he has paid for an article he did not get, and the market price of the substituted article delivered to and retained by him."

Many other American cases might be cited to the same ef-

fect, but such citation would add little to the recognition or establishment of the rule here announced, and unduly lengthen this opinion.

✓ We therefore hold that, in treating the words "Star A Star" in the nature of a condition precedent, or warranty, the court below was right, and its judgment is affirmed.

✓ MOUNT, GOSE, PARKER, CROW, FULLERTON, and CHADWICK, JJ., concur.

[No. 7656. Decided April 19, 1909.]

McNAUGHT-COLLINS IMPROVEMENT COMPANY, *Appellant*, v.
THOMAS MAY *et al.*, *Respondents*.¹

ADVERSE POSSESSION—CLAIM OF RIGHT—SETTLEMENT ON PUBLIC LANDS—MISTAKE. The settlement without color of title upon government land, in good faith, believing it to be such when it in fact belonged to a private owner, is not such a taking under "claim of right" as would constitute an adverse possession; since there is, in its inception, no disseizin by possession adverse to the government, and no claim of right thereafter upon discovering the mistake (*Overruling Johnson v. Conner*, 48 Wash. 431, 93 Pac. 914).

Appeal from a judgment of the superior court for King county, Griffin, J., entered July 31, 1908, upon the verdict of a jury rendered in favor of the defendants, in an action of ejectment. Reversed.

Ballinger, Ronald, Battle & Tennant (J. L. Corrigan, of counsel), for appellant.

Tom Alderson, for respondents.

DUNBAR, J.—This is an appeal from a judgment of the superior court of King county, entered upon the verdict of a jury rendered in favor of the defendants, in an action to recover possession of certain lands, situated in King county. The plaintiff in its complaint alleged ownership in fee of said lands, the possession of the defendants, demand there-

¹Reported in 101 Pac. 237.

Apr. 1909]

Opinion Per DUNBAR, J.

for, and refusal to surrender the same to the plaintiff; and proved a chain of title from the United States down to the plaintiff. The defendants by their answer denied ownership in plaintiff of said land, admitted their possession, and affirmatively pleaded their title to said land by open, notorious, exclusive, continuous, and adverse possession of said property, under claim of right, for more than fifteen years before the commencement of plaintiff's action.

It is unnecessary to discuss the testimony in this case. The vital question is raised by an assignment of the appellant that the court erred in giving the following instruction to the jury:

"If you believe from a fair preponderance of the evidence that the defendants in good faith entered upon the land in controversy under the supposition and belief that it was government land, and that they might hold the same as such, and if you further find from a fair preponderance of the evidence that more than ten years prior to the commencement of this action, upon discovering the mistake, they openly and notoriously held the same in hostility to the title of the actual owner or claimant, and that since then they have been in the open, notorious, exclusive, continuous, and adverse possession for ten years prior to the commencement of this suit, your verdict will be for the defendants."

It is well established that, in order to set the statute of limitations running against the owner, the possession must be adverse, open, notorious, exclusive, continuous, and with color of title or claim of right. That, at least, is the established law of this state, and in effect of all other jurisdictions. Many cases are cited by the appellant to establish these propositions, but it is not necessary to discuss them; for their force as the law of the land is admitted by counsel for the respondents. The pivotal question is, Does a settlement on government land, believing it to be government land, when in fact it is the land of a private owner, constitute a claim of right? It may be conceded in this case that there is no color of title in the respondents, and that the judgment can only be affirmed

on the theory that the settlement upon government land in good faith constituted an adverse possession because it was possession taken under claim of right. Many cases decided by this court are cited by counsel for both the appellant and the respondents to sustain their respective theories. But those cases, without specially reviewing them, simply lay down the general law and the requisites of possession which we have mentioned above.

But unfortunately there are two cases which have been decided by this court which, for some cause, are squarely in conflict on this proposition. The case of *Johnson v. Conner*, 48 Wash. 431, 93 Pac. 914, announces the rule as follows:

"While an entry upon the land of another, under the supposition and belief that it is government land and that the party entering may hold the same as such, may not of itself constitute an entry under claim of right, yet where such an entry is made in good faith, and the entryman upon discovering his mistake proceeds to openly and notoriously hold the same adversely and in hostility to the title of the actual owner or claimant, we think this constitutes an adverse holding and disseizin under a claim of right;"

citing several cases which, upon examination, we find do not sustain this doctrine, the cases not involving the particular question involved in that case and in this, viz.: whether a settlement on land, believing it to be public land, was a settlement under a claim of right which would have the effect of disseizing the rightful owner. While in *Yesler Estate v. Holmes*, 39 Wash. 34, 80 Pac. 851, the opposite doctrine is announced, the court saying:

"On this subject the court, in substance, instructed the jury that, under our statute, the rightful owner of real property is seized of the same, whether he is in possession of it or not, and that disseizin can only occur where there is an adverse and hostile entry; that an entry, to constitute an adverse or hostile entry, must be under a claim of right, made for the purpose of dispossessing the owner; and that an entry on the lands of another, under a mistaken, though honest, belief that such lands are public lands and subject to

Apr. 1909]

Opinion Per DUNBAR, J.

entry, would not work a disseizin of the true owner. It is contended that the court has here laid down a more harsh rule than the law warrants, in that mere possession, if sufficiently open and notorious to apprise the community that the land is in the possession of the occupant, will work a disseizin of the true owner."

But the instructions are in accord, it seems to us, with the cases cited by the court, some of which were the same cases cited in *Johnson v. Conner*, *supra*. This case of *Yesler Estate v. Holmes*, was however not cited in the case of *Johnson v. Conner*, was evidently overlooked, and had probably not been called to the attention of the court in the argument of the case. So that the one or the other of these cases must be overruled, to the end that the law may be made certain upon this question.

In order to constitute adverse possession there must be a disseizin of the owner at some particular time. The possession must be open and notorious in order to give notice to the owner, so that he may have an opportunity to try title with the possessor, or usurper, as he may be termed. It must be continuous and exclusive, of course, and under color of title or claim of right, in good faith; otherwise the claimant would simply be a common trespasser. This disseizin must necessarily and logically constitute the commencement of a new title working a change in the ownership of the land; the initiation of a title which will ripen into ownership, if persisted in and not interfered with by the true owner. This possession must be an independent possession, and not subservient to a superior right or title. Then, if at some particular time there must be a disseizin which starts the new title in the claimant, when does that time arise, under the theory announced in *Johnson v. Conner*? When the claimant settles upon the land believing it to be government land, his possession is subservient to the government. It is true, by observing the rules prescribed by the government, he may claim some rights under his possession when he comes to make for-

mal application for the land. But in no sense could he be said to be holding possession hostile or adverse to the government. Hence, there is no hostile possession adverse to the true owner at that time. Now, under the theory upon which this case was decided, the hostile and adverse possession commenced at the time when the respondents discovered that the title of the land was not in the government, but was in some private individual. If it was at that time that the statute was set in motion by the commencement of the adverse possession by reason of the disseizin of the true owner, then there certainly was no settlement under claim of right, because the claimants knew that the title was not in the government but in some one else, and they would logically then be in the same position as though no settlement had ever been made, under the theory that the land was government land. It is not consistent to hold that their right of possession adverse to the owner commenced after they were aware that the title was not in the government, and at the same time allow them to date back their claim of right to a period beyond their knowledge on this question.

So far as the argument on the policy of these different decisions is concerned, it would seem to us that the better reasoning is in favor of the rule that the settlement upon government land does not constitute an adverse possession. No hardship can be imposed upon any one under this rule, for it is a matter of easy ascertainment whether land which a party desires to settle upon is government land or whether the title has passed from the government.

It is not necessary to review the many other cases cited from this court, for they do not bear upon the question involved here. We are forced to the conviction that the instruction was wrong, and that the judgment must be reversed; and as this is the main reliance of the respondents and the only defense they have against the claim of the appellant, a new trial would be fruitless, and the court is in-

Apr. 1909]

Opinion Per DUNBAR, J.

structed, therefore, to grant the judgment as prayed for by the appellant.

FULLERTON, CHADWICK, MOUNT, CROW, and GOSE, JJ.,
concur.

[No. 7713. Decided April 19, 1909.]

P. J. ELLIOTT *et al.*, Appellants, v. PUGET SOUND WOOD
PRODUCTS COMPANY *et al.*, Respondents.¹

CORPORATIONS—ACTIONS—ON BEHALF OF CORPORATIONS—STOCK-
HOLDERS—CONDITION PRECEDENT—REDEMPTION IN CORPORATION. A court
of equity will not entertain a suit by stockholders to set aside a
contract made by the officers of the corporation, alleged to be con-
trary to the interests of the corporation and made without authority,
unless it is shown in the complaint that the stockholders have sought
redress in the corporation, or that it would be fruitless for them to
do so.

Appeal from a judgment of the superior court for King
county, Morris, J., entered September 3, 1908, dismissing
an action by stockholders to set aside a contract and appoint
a receiver for a corporation. Affirmed.

Jay C. Allen, for appellants.

Ballinger, Ronald, Battle & Tennant and Walter S. Fulton
(C. J. France, of counsel), for respondents.

DUNBAR, J.—This is an equitable action against a cor-
poration. The complaint in this case is so extremely lengthy
that it is impossible to reproduce it here, and it is difficult to
condense the essential statements of the complaint so that it
may be intelligently understood or discussed. We will, how-
ever, accept practically the appellants' statement of the
case. The action was brought by several stockholders, for
themselves and other stockholders, of the Puget Sound Wood
Products Company, a corporation, against the corporation

¹Reported in 101 Pac. 228.

and B. W. Bell, R. N. Calkins, and R. S. Green, as president, manager, and secretary-treasurer, respectively, of the corporation, and against the Monarch Wood Products Company, a corporation, for the purpose of testing the validity of a contract entered into between the Puget Sound Wood Products Company and the Monarch Wood Products Company, whereby, for an alleged secret process for the distillation of wood, the Puget Sound Wood Products Company gave the Monarch Wood Products Company fifty-one per cent of its stock. The action is also brought for the appointment of a receiver.

The complaint alleges that the plaintiffs are stockholders in the Puget Sound Wood Products Company, and states the organization of the Puget Sound Wood Products Company with a million shares of the par value of one dollar each, of which stock the defendants Bell and Calkins signed a subscription list for five shares each, and R. S. Green for the remaining 999,990 shares; alleges that the subscription of Green was sham, fraudulent, and not in good faith, and void; that the three above named defendants then held a meeting for the election of trustees and officers; that at said meeting the total of shares represented was fifteen, and that the remaining shares, as shown by the minutes of that meeting, had not been subscribed or represented. This was on the 2d day of February, 1907.

It alleges that on the 6th day of July, 1907, two of the defendants, Bell and Green, together with one Andrew Quigley, organized the Monarch Wood Products Company, with a capital stock of a million shares, of the par value of one dollar each; that Bell and Quigley subscribed for one share each of the Monarch Wood Products Company, Green for ten shares, the remaining shares being held by one Holbrook and the defendant Calkins; that a board of directors of the last mentioned company was elected on the same day by a meeting between the defendants Bell and Green, each representing one share only of the stock; that the defendant Green

Apr. 1909]

Opinion Per DUNBAR, J.

caused himself to be elected secretary and treasurer of both corporations, and that he refused to give the bond of \$5,000 required by the laws of the Puget Sound Wood Products Company; that on the day of the formation of the Monarch Wood Products Company, Bell and Green, as president and secretary of the Puget Sound Wood Products Company, without authority and without any consideration, made and entered into a written contract with themselves, as president and secretary of the Monarch Wood Products Company, for the purchase of an alleged secret process for the distillation of wood, which the Monarch Wood Products Company claimed to own, and delivered to the Monarch Wood Products Company five hundred and ten shares of the Puget Sound Wood Products Company. Plaintiffs deny that the Monarch Wood Products Company ever had any interest, right, or title to any such process, and allege that the process which it at that time claimed to hold was valueless; alleged that the plaintiffs had no knowledge, when they subscribed and paid for their stock in the Puget Sound Company, of the existence of any such contract; that such information was knowingly and wilfully withheld from all the *bona fide* owners of the stock of said company, and that the Puget Sound Company had no authority to transact business as such corporation when it entered into the contract, because at that time its stock had not been subscribed for; that the affairs of the company are being grossly mismanaged; that the company is insolvent, and that, unless a receiver is appointed, they and other *bona fide* stockholders who have paid cash for their stock would lose the whole thereof. This is, in substance, the complaint.

The defendants all appeared, and filed a demurrer upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The court took the demurrer under advisement, and proceeded to hear the affidavits filed by each party in support of, and against the appointment of, a receiver. Subsequently the court sustained the demurrer to

the complaint, and of course denied the appointment of a receiver. Afterwards the action was dismissed, judgment was entered, and plaintiffs, standing on their complaint, appealed.

It is urged that the court erred in sustaining the demurrer to the complaint and refusing to appoint a receiver. In support of the judgment of the court, it is contended by the respondents that the complaint, inasmuch as it states that the Puget Sound Wood Products Company has no right to do business in this state and asks relief, should be construed to be an action to oust the corporation from the exercise of corporate powers. It is contended that at common law a court of equity had no such jurisdiction; citing Clark & Marshall on Private Corporations, §§ 316-317; and that, inasmuch as the statutory proceeding to oust a corporation from the exercise of corporate powers in this state is by an information in the nature of *quo warranto* (Bal. Code, §§ 5780-5789; P. C. §§ 1434-1443) the action cannot be maintained, and that a court of equity, therefore, has no jurisdiction to pass upon the legality of a corporation of any kind in this state. It is also contended that, taking the complaint all together, there can be discovered no allegation that the officers of the Puget Sound Wood Products Company have acted fraudulently or with bad faith in the management of the corporation. It is also contended that this complaint was bad for the reason that one who purchased the stock of the corporation cannot complain of any transaction of that corporation unless he owned stock at the time the transaction occurred, and the complaint shows upon its face that these stockholders did not own stock at the time of the transaction complained of. It is also contended that the demurrer should have been sustained for the reason that the averments are irreconcilable and inconsistent; also, that the complaint is bad because it shows a misjoinder of actions—that it joins an action for restitution of property to a corporation with an

Apr. 1909]

Opinion Per DUNBAR, J.

attack on the corporation because it was illegally incorporated.

Without passing upon these many questions, there is another proposition which, it seems to us, is decisive of this case, viz., the third proposition discussed, that a bill by one or more shareholders in behalf of the general body cannot be maintained unless it shows that the plaintiffs have exhausted every means of putting the corporation in motion. This is the rule announced in 10 Cyc. 975, and cases to sustain this rule are cited from a great number of states, from the United States supreme court, and from England. In fact, it is conceded that this is the general rule, for reasons which may well be imagined. There are several cases where, for reasons stated, the stockholder is permitted to appeal to courts without first seeking redress from the corporation itself; for instance, where the facts stated conclusively show that an application to the corporation would be useless. This rule is based on the familiar doctrine that courts will not compel a litigant to do a useless thing; and the cases cited by appellant furnish instances of this kind, though in the first case cited, viz., *Smith v. Dorn*, 96 Cal. 73, 30 Pac. 1024, it was alleged in the complaint that it would have been useless to make an application to the corporation, and this was not denied by the answer, the case not being disposed of by demurrer. Some of the other cases come nearer sustaining the rule contended for by the appellant.

But it is plain that this question must be decided with reference to the facts in each particular case, and we have been unable to find a case in which a complaint has been sustained where the allegations were similar to the allegations of the complaint under discussion. This may be a technical rule, yet it is founded on general principles of justice and of necessity in the transaction of corporate business, because it is manifest that corporations which do their business through the officers of the corporation, in the absence of fraud or oppression, must be allowed to transact their own business and

settle their own difficulties; the duty of the stockholder being to bow to the will of the majority as expressed through their agents.

It is said by the appellants in their brief that a corporation has no means of acting except through its agents, and that the acts complained of in this case are the acts of those agents; therefore a court of equity will interfere at the suit of a shareholder without any proof or allegation of a demand upon such agents, for a demand would ordinarily be nugatory under these circumstances. Of course, it is well answered that every grievance in a corporation may arise from the acts of its agents or directors, and that if the position of the appellants is tenable, the general rule would be destroyed. The case of *Dumphy v. Traveller Newspaper Ass'n.*, 146 Mass. 495, 16 N. E. 426, presents the reason for the general rule very aptly, when it says:

"Courts of equity are swift to protect helpless minorities of stockholders of corporations from oppression and fraud of majorities. But the legal relations into which the members of a corporation enter require them to seek redress of supposed wrongs done them as stockholders from its officers, and from the corporation itself, before applying elsewhere. . . . Stockholders in a corporation impliedly agree, when they join it, to act in the corporate business through officers chosen to represent them, or by vote at meetings of the members regularly called; and so, if they deem themselves aggrieved as shareholders by the dealings of others with it, or by the acts of its managers, they are bound to seek their remedy through corporate channels; First, by application to the officers in charge; and, failing there, secondly, to the corporation itself, at a meeting of its members. If they can obtain justice at the hand of neither, the courts are open for their relief. It would be contrary to the fundamental principles of corporate organizations to hold that a single shareholder can at any time launch the corporation into litigation to obtain from another what he deems to be due it, or to prevent methods of management which he thinks unwise."

In this case there is no allegation that any application had been made to either the directors or the stockholders of the

Apr. 1909]

Opinion Per DUNBAR, J.

corporation. To the same effect is *Wolf v. Pennsylvania R. Co.*, 195 Pa. St. 91, 45 Atl. 936.

Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827, is a leading case on this subject. Justice Miller, in a very learned and exhaustive review of the authorities, both American and English, after setting forth in detail what must exist as the foundation of a suit in equity (and many of those conditions are such as are described in the complaint in this case) proceeds as follows:

"But, in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court, that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest not a simulated effort with the managing body of the corporation to induce remedial action on their part, and this must be made apparent to the court."

From an examination of the authorities cited and discussed in this case, and from such other authorities as we have had access to, we are of the opinion that in this particular, at least, the complaint does not state a cause of action. Of course, it is not material upon what ground the court sustained the demurrer. The demurrer being properly sustained, it follows naturally that no error was committed in not appointing a receiver.

The judgment will be affirmed.

MOUNT, CROW, FULLERTON, CHADWICK, and GOSE, JJ.,
concur.

[No. 7655. Decided April 20, 1909.]

In re PALMER'S WILL.

MARGARET BETCHER, *Appellant*, v. JAMES BRADY,
*Administrator, et al., Respondents.*¹

APPEAL—REVIEW—FINDINGS. On trial *de novo* on appeal of a will contest, findings of the trial court on conflicting evidence are to be reviewed by the supreme court on the record, and will be reversed if erroneous and the evidence is not equally balanced.

WILLS—EXECUTION—DURESS AND UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY. The evidence shows that a will in favor of the husband of the testatrix was induced by duress and undue influence, and findings to the contrary will be reversed on trial *de novo* on appeal, where three disinterested and credible witnesses swore positively to many threats and constant importunities and intimidation upon the part of the husband, within their personal knowledge or related to them by the testatrix, whereby the testatrix, who had suffered a stroke of paralysis and was feeble and in her last sickness, was impelled to will to her husband property recently inherited by her, and which she wished to will to her daughter, her only living heir, because of her husband's intemperance and the wishes of her deceased son from whom the property was derived, such witnesses being unimpeached and unopposed on essential matters except by the testimony of the husband, who flatly contradicted all of them.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered March 21, 1908, dismissing, on the merits, an action to contest a will, after a trial before the court without a jury. Reversed.

S. J. White, for appellant.

M. J. McGuinness and *Robert McMurchie*, for respondents.

DUNBAR, J.—This is an action brought by Margaret Betcher to contest the will of her mother, the deceased Sarah Jane Palmer, on the ground of undue influence and intimidation wrought by her husband, James P. Palmer, in the procurement of the will in his favor. The property covered by the will was practically all inherited by the deceased

¹Reported in 101 Pac. 220.

Apr. 1909]

Opinion Per DUNBAR, J.

a short time before her fatal illness. The contestant is the only living heir of deceased. Sarah Jane Palmer was sixty years of age when she died. About the 1st day of January, 1907, she was stricken with paralysis, which finally caused her death. The will was executed upon February 7, 1907. The court found that the petition of Margaret Betcher contesting the will aforesaid should be denied, and that James Brady, administrator with the will annexed, should have judgment against her for his costs and disbursements. From this judgment this appeal is taken.

Several errors are alleged upon the introduction of evidence and upon technical legal questions, but with the view we entertain of the merits of the case, their discussion and decision become immaterial. The merits of the case, as found by the court, will be found in finding of fact No. 4, which is as follows:

"That at the time of making said last will and testament so proven and admitted to probate as aforesaid, the deceased was of sound and disposing mind and memory and in all respects competent to make a valid will, and that at the time of making said last will and testament so proven and admitted to probate as aforesaid the said deceased acted freely and voluntarily and of her own will and was not coerced, commanded, threatened or intimidated to the making of said will, and that said deceased was not unduly influenced by James P. Palmer, or any other person in the making of said will, and that in the making thereof she acted as a free agent and that the disposition of the property of said deceased as made in the said will was according to the desire, wish and will of the said deceased at the time of the making thereof."

The testimony in this case is not extensive, and we have examined it carefully, and are unable to reach the conclusion reached by the court in said finding of fact. We appreciate the fact that ordinarily, if the testimony seems anyways nearly equally balanced, this court, recognizing the advantage that the trial court has in viewing the witnesses, would hesitate to disturb its judgment. Nevertheless, the case is to be determined here upon the record, and the determi-

nation of the case from the record is a duty which this court cannot escape.

The record presents a plain conflict in the testimony. The first witness who was introduced by the contestant, viz., John W. Riddall, who was an old acquaintance of the deceased and her husband, and with whom they lived a long time prior to her death, swore positively that the husband was constantly telling her that he wanted her to make a will and will him that money that she was getting from Iowa; that she said, no, she did not want to do it; that in the first place he was drunk all the time and he would spend it and squander it, and in the second place, it should rightfully go to her daughter, because it had been left by her son, and that it was his wish that it should finally go to the daughter; that he would then get mad at her and would look at her, stare her in the face, and shake his finger at her, and say, "You must; you must. You have got to make it. I must have it," and would promise that if she would make a will to him, he would quit drinking; that she tried him for a while, and that he continued to drink; that the woman then positively told him that she would never make a will out to him; that the husband would commence talking to her about the will almost every day, making covert threats, saying, "You must; you have got to; you have got to mind me;" that sometimes she would turn her eyes away from him, and sometimes the tears would come in her eyes, but on the next day after she would say nothing; that when she was taken down with a paralytic stroke, he told her again that he wanted that will, and she told him, "No, I have told you that I did not want to will the property to you, but that I want it to go to my daughter;" and that over and over again the same thing would be brought to bear upon her; that the night before the will was made out, he was sleeping in a room adjoining them, the door being open, and that they talked all night nearly about the will, and finally the deceased said, "Well, I can't stand it any longer. This worrying over a few dollars is putting me in my grave and I

Apr. 1909]

Opinion Per DUNBAR, J.

wont stand it. I will make out the will just for the sake of peace;" that she said, "Get it made out as soon as you can, for God's sake, and let me have peace;" that she was so confused that she wouldn't get up and eat; said she had had no sleep and she didn't want anything, and she didn't get up; that the husband went and got the scrivener, Mr. Street, and he came up and made the will that afternoon; that Mr. Palmer told him how to make out the will—the conditions of it and that when the will was made out, the woman was so weak that Mr. Palmer held her hand while she signed it, and as soon as she signed it she broke down and cried like a child. This and much more was testified to by the witness Riddall, and we are unable to determine that this testimony was at all shaken on cross-examination. The witness also testified that Mrs. Palmer was afraid of her husband.

Mary A. Schuster testified, that she was frequently at the house where Palmer and his wife lived, helping and doing a part of the work, and that the deceased said when she asked her how she felt, "I don't feel very good." "I says, 'Why Mrs. Palmer?' she said, 'I had to make a will over to Uncle Jim;' that is her husband; and I said, 'I wouldn't do it.' She said, 'No, I wouldn't do it, but he made me do that, and he said I have to do it;' she had to mind him." The witness was a German woman and her testimony is a little awkward in expression, but she testified, in substance, that the sick woman took her hand, and adjured her not to tell anybody what she had been telling her about her husband; that she was afraid; and told her that he had intimidated her with a gun—came in with a gun in his hand and told her that if she did not mind him, that would go through her brain; and that since that time she would never stay alone in the house, and had asked Mr. Riddall if he wouldn't stay with her as long as she lived, saying that she was going to make another will before she died, and that her husband shouldn't have that money. The witness also testified that the husband had come home on a certain occasion, had "got mean" with

his wife, went into the kitchen and got a gun and came back and was exhibiting it, pointing it, in the language of the witness, "at the poor woman." She also testified that Palmer had told her, when he stopped at her house to get her to go up and stay with his wife while he went for Mr. Street to make the will, that his wife did not want to make the will, but that she had to make it before she got worse; and in discussing an interview between Palmer and his wife, Palmer said, "Now, she has got to make a will to me, and I am going to make a will to her, and only just give Maggie—that is the daughter—a dollar, and his daughter a dollar so they could keep up their will, and so he said she understood about the arrangement, and he said, 'Wont you do it, Sarah?' and she said, 'I don't know; I can't say about it.' He said, 'You have got to do it; you have got to make that will over to me,' that same night; he just forced her to it. I heard it myself."

Minnie P. Judy, another neighbor woman who was about the house a good deal, assisting the deceased, and who was there at the time the will was executed, stated that Palmer objected to the bequest of \$10 in the will to Mrs. Palmer's daughter, saying that one dollar was enough. She also gave the same description of the condition of the woman at the time of the signing of the will, and that after she had signed the will she "cried as hard as she could cry;" that after she had signed the will, the decedent asked her if she could make another will; said that she did not want to make the will that she had made; that Mrs. Schuster told her that she could not make another will, but that she would ask her husband about it; and she did ask him about it, and he said she could make as many wills as she saw fit to make; that she said the reason why she did not want to make that will in that way was that it was her son's money and he did not want Mr. Palmer to have it, and she did not want it to go that way. She also testified to threats made by Palmer to his wife to force her to sign the will.

Apr. 1909]

Opinion Per DUNBAR, J.

S. F. Street, who drew the will, did not seem to be very certain about the condition of the woman, and did not undertake to testify whether she was competent to make a will and devise her property or not. When asked if he asked her whether it was her will or not and what she answered, the witness said, "She answered me that it was—as far as she was able. Of course, she was a very sick woman." He also testified, in answer to the question whether he saw anything that indicated undue influence, "Well, I couldn't answer that question very readily. Of course, I could not tell. Most of the talking was done by her husband, of course, because she was not able to talk much herself." He also testified that Mr. Palmer told him the conditions of the will; and finally, asked whether she was weeping or crying, he answered, "Well, she didn't do much laughing. She may have wept some. She was doing that a good deal most of the time."

Mrs. Parker, a witness for the respondents, testified that she was acquainted with Mrs. Palmer; that she was with her during her sickness; that she had never heard her say anything about any undue influence being brought to bear upon her by Mr. Palmer or any one else; but she had heard Mrs. Judy and Mrs. Schuster advise Mrs. Palmer to make another will; that upon one occasion Mr. Palmer brought the wills into her presence and said, exhibiting the will that he had made, "This is a will I made to Sarah (Mrs. Palmer), and this is the one she made to me. In case either one of us passed away," he said, "the other would have a living." He said, "I have a daughter and she has one, and we have made these wills so that we would not be disturbed. If I should pass away, why she would have no bother." Dr. Hall, who was called in to see Mrs. Palmer shortly before the will was made, testified that he thought she had sufficient intelligence at that time to dispose of her property and was competent to do so. Mr. James P. Palmer, the husband, absolutely denies all testimony of the witnesses Riddall, Mrs. Schuster and Mrs. Judy, testifying that he and his wife lived in perfect

sympathy, and had never had any trouble at all concerning wills. Mrs. Judy and Mrs. Schuster, on rebuttal, testified that statements made by Mrs. Parker in reference to conversations which she alleged she heard between them and Mrs. Palmer were false; that no such conversations had ever occurred.

This is, in substance, the testimony in the case on the material points. We do not think that the fact, which Palmer was anxious to make appear in the record, that he had agreed with his wife to make a will devising all his property to her, and cutting off his daughter, in consideration that she would make the same sort of a will to him, proves anything in his favor. He was a man in good health and, so far as ordinary observation was concerned, there was no probability of his early demise; while his wife was in a condition of health which it was believed would soon result in death. The fact that he proposed to have such wills made, under the circumstances of the case, would rather tend to show a disposition to overreach her, than to enter into such an agreement for her benefit or even for a mutual benefit. Mr. Palmer is an interested witness, and this must be taken into consideration in weighing his testimony. If the will fails, the property will go to the daughter. The witnesses for the contestant are disinterested witnesses. It does not appear that it will be of any benefit to them, financially or otherwise, whether the will is sustained or rejected by the court. There was some attempt to show that the witness Riddall had sent a proposition to Palmer to leave the country and not testify in the case if Palmer would give him \$300. This charge was not substantiated at all, and even if it had been true, the fact that he agreed to leave the country and not testify in the case would indicate, if it indicated anything, that if he stayed and was compelled to testify, his testimony would have to be opposed to the interests of Mr. Palmer. Mrs. Schuster and Mrs. Judy were simple-minded, good-hearted, hardworking women, neighbors of the deceased, and so far as the record shows, of

Apr. 1909]

Syllabus.

good character and absolutely above reproach. The same might be said, it is true, of Mrs. Parker, the witness for the respondents, but her testimony was all of a negative character, she simply testifying that she had not heard any complaint made by Mrs. Palmer. But with this positive testimony of Riddall, Mrs. Schuster, and Mrs. Judy, unimpeached witnesses, opposed on essential matters only by the testimony of the beneficiary of the will, we are unable to reach the conclusion that the learned court did, that there was no undue coercion, or duress, practiced upon the decedent.

The judgment will therefore be reversed, and the prayer of the petition granted.

CROW, GOSE, MOUNT, CHADWICK, and FULLERTON, JJ.,
concur.

PARKER and MORRIS, JJ., took no part.

[No. 7464. Decided April 20, 1909.]

JOHN J. KINNANE, *Appellant*, v. D. CONROY, *Respondent*.¹

WITNESSES—CROSS-EXAMINATION—SCOPE—RELATION TO MATTERS IN CHIEF AND TO DEFENSE—BROKERS—EVIDENCE. In an action to recover a broker's commission, defended on the ground that it was subject to the approval of the vendor's wife, who refused to sign, error cannot be predicated upon permitting the defendant to ask on cross-examination whether plaintiff did not ask the wife to come in and sign the contract; it being within the trial court's discretion and sufficiently connected with the matter in chief relating to the securing of the contract, although it may also have tended to support the defense.

TRIAL—RECEPTION OF EVIDENCE—SPECIFIC OBJECTIONS. Where the question asked simply required the witness to state what he would do if he should be advised by his counsel in a certain way, an objection that it was "predicated upon facts not in the case," is valueless and insufficient to raise the point that the advice of counsel, or the action of the witness thereon, were irrelevant or inadmissible.

EVIDENCE—ADMISSION—DECLARATIONS AGAINST INTEREST—BROKERS—CONTRACTS. In an action to recover a broker's commission, defended on the ground of fraud by falsely reading to defendant a

¹Reported in 101 Pac. 223.

contract prepared for his signature by the plaintiff, cross-examination of a third party, who was interested in the commissions, as to a conversation between witness and the defendant fixing the terms of the proposed sale, is admissible as a declaration against interest upon the issue of fraud in the terms of the contract as read over to the defendant.

TRIAL—INSTRUCTIONS. It is not error to refuse requested instructions covered in the general charge.

TRIAL—COMMENTS OF COUNSEL—EVIDENCE—PURPOSES FOR WHICH OFFERED. Where appellant offered in evidence an exhibit for a specified purpose without expressly limiting its effect it becomes evidence upon any point in issue to which it is material and relevant; and it is proper to refuse to restrict the argument of opposite counsel thereon.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered June 3, 1907, upon the verdict of a jury rendered in favor of the defendant, in an action to recover a broker's commission. Affirmed.

Graves, Palmer & Murphy, for appellant.

Harold Preston and Ballinger, Ronald, Battle & Tennant, for respondent.

MORRIS, J.—The appellant sought in this action to recover from the respondent upon a written contract of employment as a real estate broker. The complaint alleges the making of the contract, the procuring of a purchaser who was able and willing to purchase upon the terms suggested in the contract, the introduction of the contemplated purchaser to the respondent, and his refusal to convey. Respondent, answering, alleges, that he made an oral contract with appellant, authorizing him to find a purchaser for his property upon certain terms and conditions, among them being his ability to procure the consent of his wife to the sale; that after agreeing upon the terms, the appellant reduced the agreement to writing; that at the time respondent was, because of physical infirmity, unable to read the contract, and appellant read it to him; that, as read by appellant, it contained the terms agreed upon, and he signed the same, but upon the further

Apr. 1909]

Opinion Per MORRIS, J.

express condition that the contract would be of no force unless the wife would also sign; that upon presenting the same to the wife for her signature (she not being present when the husband signed), she refused, and that thereupon the broker was informed that the agreement was ended; that thereupon the appellant left, saying he would return later and endeavor to obtain the wife's consent; that after appellant had departed, he discovered the contract was missing, and that the contract set forth by appellant differed materially from the one read to him. He also denies that appellant ever presented to him any intending purchaser.

Upon these issues the cause was submitted to a jury, who found in favor of respondent. A new trial being denied, the case is brought here on appeal, predicated error upon the admission of certain testimony, mainly upon cross-examination, remarks of counsel in addressing the jury, and certain instructions given and refused by the court. We will discuss these assignments separately.

(1) Appellant had testified to his meeting with respondent, their discussion of the terms of the sale, the writing of the contract, and the signature of respondent, when upon cross-examination he was asked this question: "Now, after you had written that, isn't it a fact that you asked his wife to come in and sign it?" Counsel for appellant objected upon the ground that the question was irrelevant, immaterial, and not proper cross-examination. The court overruled the objection, and the witness answered in the affirmative. It is often a difficult matter to determine how far one may proceed in cross-examination. As a general rule, such examination must be confined to facts and circumstances connected with the matters testified to in chief. Yet the rule is elastic enough to permit examination into other matters which might have a tendency to explain the conduct of the witness in the given instance, to lessen the strength of his testimony, or show a bias or prejudice which might affect his credibility. A second rule often quoted is that, "A party may not prove his own

case by cross-examination of his opponent's witnesses." It is difficult for the trial court to adhere strictly to one rule without oftentimes violating the other. In this instance, whatever would throw any light on the character of the contract, the methods employed by the appellant in obtaining the signature of respondent, or the understanding of the respondent at the time he signed the same, was proper within the first rule. The agreement to obtain the signature of the wife and her refusal to sign was a matter of defense, and within the second rule, and yet the matter embodied in the question was so intimately connected with both rules that the admission or rejection of the testimony must be left to the discretion of the trial court, and error cannot be predicated upon its ruling. 1 Greenleaf, Evidence, §§ 445, 446, 447.

(2) Upon cross-examination of the alleged purchaser, the record shows the following:

"Q. (Mr. Ronald) Suppose your counsel would advise you now that that is a homestead under the facts shown, and that Conroy, his wife refusing, cannot give you a good title. Would you still take it? Mr. Murphy: I object to that as predicated upon facts not in the case. It does not appear that Mr. Stedman has given him any advice to that effect. Mr. Ronald: But he will. The Court: I will let you ask the question. Q. (Mr. Ronald) Now, if Mr. Stedman should advise you that this is a homestead of that man and his wife, and that under the law of the state his deed without her joining will not give you good title, will you then not, notwithstanding his advice, pay them \$23,000 and take that deed? A. I understand it is not true of the property. Q. Answer the question. A. I will take it on Mr. Conroy's contract."

It is doubtful, in a technical view, whether the objection as taken is of any value, even though the court for any proper reason should have viewed the question as improper, or the evidence sought as inadmissible. The question does not purport to be predicated upon any fact in the case; nor does it assume that any such advice had been given. It asks, "Suppose your counsel would advise you now." If counsel was of the opinion that the advice of counsel was immaterial, irrele-

Apr. 1909]

Opinion Per MORRIS, J.

vant, or for any reason inadmissible, or that the action of the witness upon being advised by his counsel was for any reason inadmissible, he should have made his objection upon such ground. The purpose and intent of the question, as not being based upon any fact then appearing in the case, but upon the future action of the witness upon being advised by his counsel, again appears from the second question asked, "Now, if Mr. Stedman should advise you," etc. This objection was therefore not sufficiently definite to call the court's attention to the real ground of its inadmissibility, and cannot now be urged as error. *Coleman v. Montgomery*, 19 Wash. 610, 58 Pac. 1102.

(3) The next assignment of error is based upon the cross-examination of appellant's witness Williams, who was interrogated as to a conversation had with respondent a short time before the signing of the contract. In this conversation the terms of the sale had been discussed, and, as respondent claims, agreed upon between himself and Williams, who procured appellant to act as the broker. The conversation was material under the issues of fraud raised by respondent, that the contract as written and read to him was not the contract agreed upon, and that the same was made upon the express condition of obtaining the signature of the wife. It also appeared by the testimony of appellant that Williams had related this conversation to him, and that the same was embodied in the contract. It also appeared that Williams was to share in the commission with appellant. Declarations against interest of a party beneficially interested in the result of a litigation are always admissible. 16 Cyc. 984. Other assignments of error are based upon the admission of like testimony, but they are disposed of by what has been said in the above connection.

(4) Error is also assigned upon the giving and refusing to give certain instructions. It would serve no good purpose and unduly lengthen this opinion to set out the instructions complained of. Conceding that the instructions refused cor-

rectly stated the law, the court embodied the same legal principles in the instructions given although clothed in different language. Taking the instructions as a whole they correctly stated the law.

(5) Error is also predicated upon certain remarks made to the jury by counsel for respondent. Appellant had introduced in evidence as an exhibit the complaint in an action of specific performance brought by Bauer (the alleged purchaser) against the respondent, for the purpose, as expressed by counsel at the time of the offer, "to show Mr. Bauer's intention and willingness to take the property." During his address to the jury, counsel for respondent commented upon certain allegations in the complaint, to which counsel for appellant took exception, and requested the court to instruct the jury to disregard the same upon the ground that comment was being made upon matters not in evidence. The court refusing to so instruct, the ruling is assigned as error. The complaint being offered in evidence for one purpose, was evidence upon any point in issue to which it was material or relevant. If counsel desired to limit the evidence to the one point suggested in the offer, he should have requested the court at the time of the offer to instruct the jury that the evidence was material and admitted but for one purpose, and that they should not consider it for any other. Not having done so, he cannot afterwards be heard upon a claim of error.

Finding no reversible error, the judgment is affirmed.

CHADWICK, DUNBAR, PARKER, CROW, MOUNT, FULLERTON, and GOSE, JJ., concur.

Apr. 1909]

Opinion Per MOUNT, J.

[No. 7631. Decided April 20, 1909.]

NATIONAL CASH REGISTER COMPANY, *Appellant*, v. GEORGE H. WAPPLES, *Respondent*.¹

SALES—CONDITIONAL SALES—TRANSFER WHILE VENDEE IN ARREARS—RIGHTS OF SUBSEQUENT PURCHASERS—DEFAULT—WAIVER—REPLEVIN—TENDER AFTER SUIT BROUGHT. The purchaser of a cash register, from a conditional vendee who was in arrears at the time, takes the right and title of such vendee, where no default had been declared and the contract did not stipulate against assignment, and he may tender the balance due, with interest and costs, after suit brought, and thereby defeat an action of replevin; since the provision that the title is to remain in the vendor until the last installment is paid, with the right to retake the property, is for the benefit of the vendor, and is waived where time is not made of the essence and payments are accepted after maturity and no default declared.

Appeal from a judgment of the superior court for Whatcom county, Kellogg, J., entered February 26, 1908, upon granting defendant's motion for judgment on the pleadings, dismissing an action of replevin. Affirmed.

McBurney & Cummings and *Black, Kindall & Kenyon*, for appellant.

Fairchild & Bruce, for respondent.

MOUNT, J.—On August 23, 1905, 'the National Cash Register Company, entered into a written conditional sale agreement with a copartnership, under the name of Smith & Storrey, for the sale of a cash register from the former to the latter. The purchase price of the register was \$450. The payments were to be made in installments, \$25 cash with the order, \$25 cash upon delivery, and \$30 allowed for an old cash register; the balance, \$370, was to be paid in nineteen monthly payments of \$20 each, except the last one which was \$10, the deferred payments beginning on January 15, 1906. The register was delivered to the purchaser about October 23, 1905, and \$80 was paid as above stated. The contract provided that the title should remain in the vendor until the

¹Reported in 101 Pac. 227.

contract price was paid in full; and if default occurred in making any payment, then the remaining installments became immediately due; and, also,

"In default of any payment, you or your agent may take possession of and remove said register without legal process, and in such case all payments theretofore made by the undersigned under this order shall be deemed and considered as having been made for the use of said register during the time the same remained in the possession of the undersigned, and shall be retained and kept by said register company as such payment."

The contract was duly recorded in the county auditor's office. In January, 1906, Smith & Storrey sold and delivered possession of the cash register to the Lynden Mercantile Company, without the knowledge of the Cash Register Company. Thereafter payments were made as follows: March 20, 1906, \$20; April 21, 1906, \$40; July 18, 1906, \$40; November 6, 1906, \$20. These payments were made by Smith & Storrey. No further payments were made, leaving a balance of \$250 due on the purchase price. On December 8, 1906, the Lynden Mercantile Company was adjudged a bankrupt, and a trustee in bankruptcy took possession of the register, and on January 17, 1907, sold it to the respondent and gave respondent a bill of sale purporting to convey clear title. On March 15, 1907, the Cash Register Company demanded the balance due from respondent, who refused to pay, and directed that it file a claim with the trustee in bankruptcy. The Cash Register Company then demanded possession of the register. This demand was refused, and it thereupon brought this action in replevin to recover the machine. The respondent then tendered the amount due, with interest and costs, which the Cash Register Company refused to accept. The tender was paid into court when the answer was filed. These facts all appeared by the pleadings. Respondent thereupon moved for a judgment. This motion was granted, and a judgment entered declaring the money paid into court by the respondent to be the property of the appellant, and dismissing the ac-

Apr. 1909]

Opinion Per MOUNT, J.

tion. The plaintiff has appealed from that judgment.

The question in the case is whether the original vendee had any interest in the cash register which he might sell. The respondent does not now claim that he acquired any greater right than the original vendee had, but maintains that he has the same rights that the vendee would have had if he had not parted with his possession; in other words, that he stands in the place of the vendee in the contract and may make payment in full at any time before he is deprived of possession of the cash register. Upon this question the appellant cites and relies upon the case of *Lippincott v. Rich*, 19 Utah 140, 56 Pac. 806, to the effect that the plaintiff is not bound to accept an offer of payment from any other person than the original purchaser. In that case default had been made in the payment. The sale had been rescinded by the vendor, who had demanded possession of the property. After such default, the vendee transferred the property to a third party. Under these conditions the court in that case said that the transfer of the property "created no title in the defendants. The plaintiffs could not be compelled under such circumstances to accept against their will a new creditor, a new paymaster, or to make a new contract of sale." That is clearly the general rule, and the decision there was no doubt right. In the case at bar the sale had not been rescinded, and no demand had been made for the cash register until after the transfer by the vendee to a third party, and another transfer by that party to the respondent. There was then a demand for payment of the balance due, and a refusal by the respondent to pay, and then followed a demand for the property. The contract provides:

"Should there be any default in the payment of any installment it is agreed that all the remaining installments shall at once become due and payable. . . . In default of any payment you or your agent may take possession of and remove said register without legal process, and in *such case* all payments theretofore made . . . shall be deemed

and considered as having been paid for the use of said register."

This provision was clearly intended for the benefit of the vendor. He might waive the right to take possession after default in the payment of any installment, and rely upon his right to recover the whole purchase price, which thereby became immediately due; or he might obtain possession at any time after default in the payments, and thereupon all payments made should be considered as having been made for the use of the register. But until the vendor exercises his right by demanding or taking possession, the vendee retains his interest, with the right to pay the whole balance due or surrender the possession, as he chose. This was a valuable right, and might be sold or transferred subject to all the rights of the vendor under the contract. There was no provision in the contract against a transfer by the vendee of his interest, and time is not made of the essence of the contract.

"According to the prevailing rule the purchaser from a conditional vendee before default by the latter may acquire all of his vendor's rights under the contract, and if the conditions are duly performed or tendered by his vendor or by himself, he may obtain a perfect title to the goods. It has been judicially declared that although the conditional vendor remains the general owner until the condition is performed, yet the conditional vendee before default or after a default which has been waived by the vendor has an interest in the property as special owner which the law recognizes and protects." Burdick, Sales (2d ed.), p. 188, § 309.

See, also, 1 Mechem, Sales, § 588; Benjamin, Sales (7th ed.), p. 300; *Hatch v. Lamos*, 65 N. H. 1, 17 Atl. 979.

In this case the installments were past due. None of the payments had been made at maturity, except the payments made at the time of delivery. All the subsequent payments were made after maturity. The vendee was in arrears with his payments, but he was not in default. And if he was in default, such default was waived by the vendor because no demand had been made for the property. The vendee might

Apr. 1909]

Syllabus.

at any time, even after an action in claim and delivery was begun, pay the whole amount due with interest and costs, and acquire an absolute title. *Gilbert Co. v. Husted*, 50 Wash. 61, 96 Pac. 885; *National Cash Register Co. v. Petsas*, 48 Wash. 376, 86 Pac. 662. The respondent, as seen above, having succeeded to this right of the original vendee, stood in the same position, and was therefore at liberty to pay the balance due and obtain the title.

We think the judgment was right upon the facts stated in the pleadings, and it is therefore affirmed.

CROW, FULLERTON, CHADWICK, DUNBAR, and GOSE, JJ.,
concur.

[No. 7583. Decided April 20, 1909.]

EMMONS PASSAGE, by his Guardian Ad Litem, Mary Passage, Respondent, v. THE STIMSON MILL COMPANY, Appellant.¹

MASTER AND SERVANT—DEFECTIVE APPLIANCE—DESCRIPTION—EVIDENCE—RE MOTENESS. In an action for personal injuries caused through the negligent adjustment of a pump, a description of the conditions five years before the accident is not inadmissible as too remote, where other evidence indicated that it was in the same general condition at the time of the accident, and the record on appeal fails to show that there was any material difference at the different times; the determination of the matter of remoteness being largely discretionary.

TRIAL—MISCONDUCT OF COUNSEL—MASTER AND SERVANT—QUESTIONS SHOWING INSURANCE AGAINST ACCIDENTS. In an action for personal injuries sustained by an employee on a tug boat, it is not such misconduct as to warrant a reversal, for plaintiff's counsel to ask questions tending to show that defendant carried insurance with an insurance company allowing half pay in case of accident to employees, where it was inferable that accident insurance was carried not depending upon defendant's negligence, and where the court instructed the jury that the statements of counsel were not evidence and were not to be considered.

APPEAL—REVIEW—EVIDENCE. A verdict supported by evidence, although conflicting, will not be set aside on appeal.

¹Reported in 101 Pac. 239.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—KNOWN DANGERS—MOMENTARY FORGETFULNESS. The rule that momentary forgetfulness of known dangers does not necessarily constitute contributory negligence by a servant, applies (with due regard to the circumstances) to machinery and appliances with which or upon which the servant is working, especially in case of an inexperienced or youthful employee obeying an order to hurry.

DAMAGES—MEASURE—FUTURE SUFFERING AND EARNING CAPACITY. Where an accident resulted in the loss of a finger, with suffering and weakness at the time of the trial, it is proper to instruct the jury that they may take into consideration the probable future suffering and loss, if any, and probable future earning capacity, in assessing the damages.

MASTER AND SERVANT—NEGLIGENCE OF MASTER—APPLIANCES—EVIDENCE OF SURROUNDINGS—ADMISSIBILITY. In an action for personal injuries sustained by a servant in starting a pump, whereby his hand was crushed in a narrow space between a fly-wheel and the framework, it is proper to refuse to strike out evidence showing a limited working space between the wall and the fly-wheel, more or less affecting the method of work and explaining the surroundings, although the plaintiff admitted on cross-examination that his hand was not caught there and that it did not have anything to do with the injury.

TRIAL—INSTRUCTIONS. It is not error to refuse to give requested instructions covered in the general charge.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered February 1, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee on a tugboat. Affirmed.

Roberts & Hulbert, for appellant.

Jay C. Allen, for respondent.

PARKER, J.—This action was commenced and prosecuted in the court below by the respondent against the appellant to recover damages for personal injuries resulting to him, caused by the alleged negligence of the appellant, while working as fireman upon its tugboat called the *Stimson*, on the 23d day of March, 1907, at which time he was about two months under sixteen years of age. He had had some experience

Apr. 1909]

Opinion Per PARKER, J.

about engines and tugboats, having worked at firing on other boats, covering a period altogether of about six months. At the time of the accident complained of he had worked on the Stimson about one week. His injuries consisted of having his right hand severely bruised and lacerated to the extent that it became necessary to have the middle finger amputated; and were caused, as he claims, upon his taking hold of a fly wheel attached to a pump (connected with the engine) for the purpose of pushing the pump off dead center so it would start running; and which thereupon started suddenly and carried his hand around and into a narrow space between the fly wheel and the fixed portion of the frame, where it became bruised and lacerated. He claims that he was thus attempting to start the pump by direct orders from the engineer under whom he was working, urging him to hurry and start the pump; that he had never, before coming on to the Stimson to work, had experience or worked with a pump arranged as this was; that he had not been instructed as to any particular way of starting the pump when it stopped off center; that there was no method of starting the pump when stopped in that condition, other than by taking hold of the fly wheel with the hands, this being the only method by reason of the lack of appliances and which rendered it particularly dangerous by reason of the lack of room to work in, and the cramped conditions surrounding the pump; that he did not know the fly wheel was liable to suddenly start by steam pressure from the pipes when he pushed it off center, as he claims it did in this instance and carried his hands around to the place of the accident, causing the injury before he could let go the wheel; all of which he claims was negligence on the part of appellant, especially in view of his tender age and inexperience.

These claims of plaintiff were all supported by evidence introduced in his behalf, and except as to his age and his injury, were practically all disputed by evidence introduced in behalf of defendant. It is claimed by defendant that the

injury was the result of plaintiff's own negligence and want of reasonable care, and was caused by dangers which were open, apparent and well-known to plaintiff, or could have been known to him by exercise of reasonable care; that they were incident to his employment and therefore the risk was assumed by him; that notwithstanding his age, he had such experience that instructions were not required from his employer. Upon trial before the court and a jury, a verdict was rendered in favor of plaintiff for \$850, and judgment entered accordingly. A motion for new trial made by appellant was overruled, when it appealed to this court, assigning numerous errors. We will notice the facts in connection with each error discussed so far as may be necessary. These we will review in the order of appellant's brief.

(1) E. S. Clough, a marine engineer, a witness for plaintiff, testified as to the general description of the Stimson, and especially as to the arrangement and condition of the pump. He had worked on this boat for seven years, but had not been on her or seen the pump for five years past, having left her that long since. At the close of Clough's testimony, counsel for appellant moved the court to strike out all this evidence on account of its remoteness as to time. The court denied the motion, but intimated that he would strike it unless the conditions of the pump were later shown to be the same. Appellant excepted to this ruling. At this point no testimony other than Clough's had been given. Later on, other witnesses gave testimony as to the present condition of the pump, which was not materially different from Clough's testimony, save he remembered the fly wheel as being within three-fourths of an inch of the woodwork or wall, while others placed it three or four inches away; but it is not plain that they were talking of the same wall or woodwork. Clough speaks of the "back wall" and "side wall." He was asked at one time: "Q. How far was the wheel away from the wall, as you say this is the wall? A. About probably three-fourths of an inch." There is nothing further in the record to show what

Apr. 1909]

Opinion Per PARKER, J.

wall is being talked of. At another time he was asked: "Q. What is the distance here for a man to get his hand in there? A. About three-fourths of an inch." The record again failing to show what is meant by "there." At another time he was asked: "Q. You had three-quarters of an inch between there and there? A. Somewhere between three-quarters and an inch;" with some additional questions and answers of similar character, but with the record uncertain as to the places mentioned.

Considerable of Clough's evidence consisted of indicating positions upon a diagram used as an exhibit, or in some other way than by word of mouth, and this was so in the cross-examination as well as in the direct. This diagram is not clear as to the position of the walls or framework. All that was said and otherwise indicated was probably understood by the court and jury, but we have only his words to determine whether or not his evidence is materially different from others as to the conditions surrounding the pump. The court must have concluded that it was not materially different, and that the pump was substantially in the same condition when he last saw it as when the accident occurred. If this were true, and we cannot presume to the contrary, this evidence was probably admissible, though somewhat remote as to time. We are not able to see from the record that the court abused its discretion in allowing this testimony to remain, and the admission of testimony by the trial court is very largely discretionary when remoteness of time is the only objection urged against it. 11 Ency. Evidence, 178; *Sunter v. Sunter*, 190 Mass. 449, 77 N. E. 497; *Peabody v. New York etc. R. Co.*, 187 Mass. 489, 73 N. E. 649.

Clough also testified to fixing a loose board in the floor near the pump which he could take up in order to more readily get hold of the wheel to throw it off center. This board did not seem to be there, according to the witnesses who later worked with the pump, but that is of minor consequence; and in any event, the evidence indicates that this arrangement of

Clough's rendered the pump even safer than its condition was at the time of the accident.

(2) Error is assigned upon the alleged misconduct of the counsel of the plaintiff during the cross-examination of Mr. Ives, the vice president of the appellant, substantially all of which alleged misconduct is shown by the following:

"By Mr. Allen: Q. You people have and do maintain insurance with some company by which you are allowed a certain insurance on your men, is not that a fact? A. Yes. Q. And didn't you tell Mrs. Passage not to come for the half pay for a while for it would take some time to send the papers on and get returns? A. No, sir, I referred her to Mr. Jacoby. Q. You get this half pay from an insurance company? A. We are insured. Q. And in order to get the insurance you would have to make out a claim and send it to the insurance company? A. Yes, sir. Q. And you did that in this case? A. Yes, sir. Q. And you got it from the insurance company? A. I don't know that. Mr. Hulbert: Object to all this line of testimony. The Court: Objection overruled. Mr. Hulbert: Exception. Q. Is it not a fact it does take some time before you can pay this half pay because you have to send it to the insurance company? Mr. Hulbert: Objected to. The Court: Objection sustained."

This, it is argued, was prejudicial to the appellant, preventing a fair trial in that its purpose was and had the effect of improperly conveying to the jury the impression that plaintiff's damages would be paid by some insurance company if the verdict in this case went against the defendant. In support of their argument counsel cite *Westby v. Washington Brick etc. Mfg. Co.*, 40 Wash. 289, 82 Pac. 271. We think the questions and remarks of counsel constituting the misconduct in that case presented to the minds of the jury the impression that any damages they might award the plaintiff would not have to be paid by the defendant, but by some insurance company, very much more forcibly than in this case. It is not at all clear what kind of insurance is here referred to by counsel. One might infer that it was simply accident insurance not depending on defendant's negligence,

Apr. 1909]

Opinion Per PARKER, J.

but that plaintiff would be entitled to half pay by reason of such insurance; while in the case cited it was plainly and repeatedly intimated by counsel in the presence of the jury that the insurance was against defendant's own negligence, and that damages on account thereof would have to be paid by the insurance company and not the defendant. A little later in the trial when this subject was again very briefly alluded to in the examination of Mrs. Passage by plaintiff's counsel, at the request of counsel for defendant the court instructed the jury: "That the statements made by counsel do not constitute evidence in the case and you are not to consider them as evidence." In the light of this whole proceeding and the court's instruction, we do not feel warranted in holding that the questions and remarks of counsel are such misconduct on his part as amounted to prejudicial error. We are not passing upon the relevancy of these matters; that is not the question here, even if the exceptions were sufficient and timely.

(3) It is next contended that the trial court erred in denying the plaintiff's motion for nonsuit, and also in denying its challenge to the sufficiency of the evidence and motion for judgment accordingly, at the conclusion of the entire evidence—the argument being that no negligence was proven against the defendant, that plaintiff was guilty of contributory negligence, and that he assumed the risk. The evidence covered some two hundred pages of typewriting, and we have taken considerable pains in reading and examining all of it. It is not practical within any reasonable limits, nor do we deem it necessary, to analyze the evidence in detail here. It is sufficient to state that we find conflicting testimony on substantially all questions of fact upon which these motions rest for their proper solution. There is no dispute as to plaintiff's being under sixteen years of age, or as to his being acquainted with this pump but one week. There is but little dispute as to the nature and extent of plaintiff's injury, as to the amount of his experience generally, which in any view of the evidence was comparatively limited, or as to the neces-

sity of starting the pump by taking hold of it with the hands. But the evidence is conflicting as to his knowledge of this particular pump; especially as to how it was liable to act when one attempted to throw it off center for starting, as to whether or not he was instructed concerning the dangers incident to starting it, as to whether or not he failed to exercise due care in starting the pump, as to whether or not he acted by direct orders of the engineer, and as to whether or not he was compelled by such orders to act hurriedly and without time for consideration of the dangers. As to these matters, this case is much like that of *Tergeson v. Robinson Mfg. Co.*, 48 Wash. 294, 98 Pac. 428. There was evidence to support, and if believed, to warrant the jury's findings. We cannot say as a matter of law the defendant was not negligent, nor that the plaintiff was guilty of contributory negligence.

(4) It is contended that the trial court erred in giving the following instruction:

"I charge you that if the servant is injured by danger which is known to him, or which in the exercise of care and intelligence on his part he should have known, yet if in a moment of forgetfulness, while in the discharge of his duties, and owing to the haste required to perform such duties, he momentarily forgets such danger and in such moment of forgetfulness is injured, that does not in law preclude a recovery. That is, the minute that fact appears, it is not proper for law to say, You cannot recover because you knew of the danger and you forgot it. That is a fact and circumstance which you may take into consideration with all the other facts and circumstances in determining the character of the danger and determining the question whether or not the servant was guilty of negligence."

It is not contended but what this is, generally speaking, a correct statement of the law. Indeed, it finds support in *King v. Griffiths-Sprague Stevedoring Co.*, 45 Wash. 425, 88 Pac. 759; and *Hoff v. Japanese-American Fertilizer & Fisheries Co.*, 48 Wash. 581, 94 Pac. 109. But counsel argue that it has no application here as plaintiff was injured by machinery that he was working with and upon, and that the

Apr. 1909]

Opinion Per PARKER, J.

rule of the instruction applies only where one is injured by something that he is not working with or upon, citing *Ford v. Heffernan Engine Works*, 48 Wash. 315, 93 Pac. 417. We see but little in that case touching questions incident to forgetfulness of known dangers. The views there expressed are to the effect that an employee is held to a higher degree of care in taking notice of dangers in the machinery he is working with than as to dangers not connected with the machinery immediately under his control. We do not think it was intended to lay down the rule, which counsel seems to contend for, that forgetfulness of known dangers might excuse as against contributory negligence when the danger is not connected directly with the machinery, but would never excuse when the danger was connected directly with the machinery. It would not be practical to thus lay down any hard and fast rule. Each case must rest to a large extent on its own peculiar circumstances. Amid excitement and hurrying orders from superiors, forgetfulness of known dangers even directly connected with the machinery, by one of comparative inexperience might render him excusable against contributory negligence, while forgetfulness of known dangers by one of experience amid calm surroundings with time for reflection would be no excuse. This instruction in substance only told the jury that forgetfulness does not of itself show contributory negligence. In the case of *Kane v. Northern Central R.*, 128 U. S. 91, 9 Sup. Ct. 16, 32 L. Ed. 339, in discussing the apparent contributory negligence of a brakeman, who for the moment forgot that one of the iron steps on the side of a car was missing, though he had known it before, and in attempting to use it fell and was injured, Justice Harlan said:

“But in determining whether an employee has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be had to the exigencies of his position, indeed, to all the circumstances of the particular occasion.”

We think the giving of this instruction was not error, and in view of the evidence, quite appropriate.

(5) Error is claimed by the appellant in the giving by the court of an instruction to the effect that in compensating plaintiff for injuries, if the jury should find for him, they might take into consideration his probable future suffering, and also the loss, if any, of his probable future earning capacity. Counsel objects to this instruction because of lack of evidence as to his future suffering and future earning capacity. It is true the direct evidence on this question was very slight, but the plaintiff testified to some present pain and to some present weakness in his hand; this together with the actual loss of his finger rendered this instruction proper. The smallness of the verdict renders it practically certain that it did not act to the prejudice of the defendant.

(6) Appellant contends that the trial court erroneously refused to give the following requested instruction:

"I ask the court to instruct the jury also not to consider the fact of the wheel being close to the wall on the left hand side as the witness, the plaintiff himself, testified it had nothing to do with the accident."

In the description of the pump and its surroundings, witnesses had testified as to the distance of the wheel from the wall, which testimony tended to show the limited working space surrounding the pump, and in the somewhat extended and searching cross-examination of the plaintiff, it was asked and answered as follows:

"Q. You didn't get your hand caught in between the wall and the fly wheel on the left hand side? A. No, sir. Q. And the wall on the left hand side didn't have anything to do with your injury, did it? A. No, sir. Q. The fact of the wall being there within about four inches of the fly wheel, that didn't have anything to do with your getting your finger caught in there, did it? A. No, sir."

This, it is argued, rendered all testimony as to the proximity of the wall irrelevant and was prejudicial since its tendency

Apr. 1909]

Opinion Per PARKER, J.

was to show dangers foreign to the accident. It will be noticed these were leading questions, the whole amounting to little else than an opinion of the witness expressed in words of counsel, put into the witness' mouth. There was considerable testimony by other witnesses, as well as the plaintiff, which tended to show the proximity of the wall and the limited surroundings generally, all of which more or less affected the method of working with and manipulating the pump. We do not regard this case, in this respect, analogous to *Tergeson v. Robinson Mfg. Co.*, 48 Wash. 294, 93 Pac. 428, cited by counsel. In that case there was apparently an entire absence of evidence of a certain piece of alleged defective machinery having anything to do with the accident, the injury being caused by another part of the machinery. We think it was proper for this evidence to remain in the case for the consideration of the jury, and that it should not be excluded solely on account of these leading questions being answered in the affirmative by the plaintiff. The proximity of the wall may not have been in a certain sense the cause of his hand being caught, but it did assist in explaining the immediate surroundings.

(7) Error is claimed by appellant based upon the court's refusal to give certain other requested instructions. However, we are satisfied from a careful examination of those given by the court that the same ground was in substance covered, at least to the extent required in the case.

The foregoing disposes of all the matters complained of which we deem necessary to review. There were some other minor assignments of error, but they are disposed of in the foregoing in so far as they require discussion. We conclude that the record does not show any reversible error, and therefore the judgment of the lower court is affirmed.

MOUNT, DUNBAR, GOSE, CROW, FULLERTON, and MORRIS,
JJ., concur.

[No. 7688. Decided April 26, 1909.]

FREDERICK W. HOYT *et al.*, Respondents, v. INDEPENDENT
ASPHALT PAVING COMPANY, Appellant.¹

DAMAGES—PERSONAL INJURIES—CAUSE OF INJURY—RESULTING OPERATION—EVIDENCE—SUFFICIENCY. In an action for personal injuries there is no substantial evidence that a fall upon a defective plank caused a displacement of pelvic organs, requiring an operation, and it is error to submit the issue to the jury, where it appears, that the plaintiff's family physician, called by her, testified emphatically that the condition necessitating an operation was not caused by the fall, but already existed; and there was other medical evidence offered by plaintiff showing that the condition resulted from childbirth prior to the accident, and there was nothing but the plaintiff's own testimony to the contrary, attempting to give the cause of the pain experienced.

JURORS—EXAMINATION—LATITUDE. In the examination of jurors latitude should be allowed to enable counsel to intelligently exercise peremptory challenges, even though not able to elicit sufficient to justify the rejection of the juror for cause; and a juror may be interrogated as to his connection with indemnity companies.

TRIAL—MISCONDUCT OF ATTORNEY—MASTER AND SERVANT—QUESTIONS INDICATING INDEMNITY. It is not misconduct of counsel, requiring a new trial, for attorney for the plaintiff in a personal injury case to interrogate a juror as to whether he was a solicitor for an indemnity company, where the examination was not for the purpose of informing the jury that the burden of the judgment would fall upon an insurance company.

MUNICIPAL CORPORATIONS—STREETS—DEFECTS—LIABILITY OF CONTRACTOR—CONTRIBUTORY NEGLIGENCE. A contractor doing street work under a contract with the city is responsible for negligence in putting down a plank rendering the street unsafe to one alighting from a street car at a regular stopping place, upon what she was warranted in supposing to be a platform for passengers to alight on; and one so alighting is not guilty of contributory negligence.

SAME—PLEADING AND PROOF—VARIANCE. In an action against a contractor for personal injuries sustained through a defective condition of the street, it is not a material variance or prejudicial error to receive in evidence the defendant's contract with the city showing its duty to keep the streets in safe repair, without having alleged the contract, where the complaint specifically charges defendant's act

¹Reported in 101 Pac. 367.

Apr. 1909]

Opinion Per DUNBAR, J.

of negligence which caused the unsafe condition and the accident; since proof establishing the responsibility does not constitute variance.

APPEAL—DECISIONS—REMISSION OF ERRONEOUS ITEM. Upon the erroneous submission to the jury of an item for \$600 damages, in an action for personal injuries in which the verdict does not disclose what portion was based on such item, the judgment must be reversed unless \$600 of the damages is remitted.

Appeal from a judgment of the superior court for King county, Griffin, J., entered March 4, 1908, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained through a contractor's negligence in carrying on street work. Affirmed on condition of remitting \$600.

Peters & Powell, for appellant.

Gay, Bailey & Rummens, for respondents.

DUNBAR, J.—The defendant, the Independent Asphalt Paving Company, entered into a contract with the city of Seattle for the paving of East Jefferson street from Ninth avenue to Twenty-first avenue. It is unnecessary to describe the character of the work which was to be done. But there was a double line of electric car tracks running along the middle of East Jefferson street, owned and operated by the Seattle Electric Company. East Jefferson street runs east and west. Abutting upon it to the south, and lying between Twentieth and Twenty-first avenues, is the residence property of the plaintiffs. It is about seventy feet from the Twentieth avenue crossing. Jefferson street on both sides of the double tracks had been excavated for a depth of about twelve inches, preparatory to the laying of a concrete bed. This concrete had been laid between the tracks, between the rails, and to a distance of eighteen inches to the outside of the outside rail. At the intersection of Jefferson street and Twentieth avenue, the contractor had laid planking between the tracks, between the rails, and for about four feet on

either side of the outside rails, one plank on top of the other. These planks were three inches by ten inches, and sixteen to twenty feet long, and were laid lengthwise with the rails. The entire street was excavated and torn up in this manner.

On the 12th of July, one of the plaintiffs, Aletha Hoyt, in alighting from a car at the intersection of Twentieth avenue and East Jefferson street, stepped down upon the planking. One of the planks tipped, causing her to sprain her ankle and fall, hurting her shoulder and head and, it is alleged, causing a displacement and inflammation of the pelvic organs. She brought this action for damages in the sum of \$20,000. Defendant denied any negligence in the construction or maintenance of the crossing, or knowledge of its danger, and pleaded affirmatively negligence and assumption of risk on the part of the plaintiff. The jury rendered a verdict for the plaintiffs in the sum of \$1,900. Judgment was entered and appeal taken.

It is alleged that the court erred in instructing the jury that they might allow damages to the respondent for the expense and for the probable pain and suffering of a future surgical operation which might be necessary by reason of the alleged injuries to the respondent's pelvic organs; the jury being instructed that they might allow damages to the extent of \$300 for the operation, and \$300 for hospital expenses, this being the amount which it was shown by the testimony would be the probable cost of the operation. The contention is that, from all the evidence, there was no substantial evidence to show that the condition which was claimed to exist by the respondent Aletha Hoyt was in any way the result of, or induced by, the accident; but that the condition existed and the operation would be necessary, if at all, because of old injuries resulting from childbirth. We are of the opinion that there was no testimony in this case to justify this instruction. Dr. Gardner, the family physician, who was introduced by the respondent and who had made an examination of her, testified emphatically that her condition

Apr. 1909]

Opinion Per DUNBAR, J.

which would necessitate an operation was not caused, and could not have been caused, by the fall; and this on direct examination by counsel for respondents. This statement and conclusion were repeated so often and in so many different forms, that it was made as plain as testimony could make it that the displacement of the uterus, and tears and wounds of adjacent parts, were not caused by the fall, but already existed before the accident. It is true that, in answer to a very long, involved, and indefinite hypothetical question, the witness afterwards said that, conceding the statement incorporated in the question to be true, the pain and evident suffering were possibly provoked by the accident. But this, in the small degree in which it sustained respondent's contention, is absolutely contradictory of the previous statements made by the witness in answer to plain questions which he evidently understood.

There was also other medical testimony to the effect that the laceration and condition of the pelvic organs were unquestionably the result of childbirth prior to the accident. So that, outside of the testimony of Mrs. Hoyt, the proof was absolutely against her contention, and this was proof offered by her. In the face of this proof, her testimony would seem to be without weight. If a witness testifies that she experiences pain, and the doctor testifies there is no condition existing which would or could produce pain, and that therefore she cannot be experiencing pain, the testimony would be conflicting, and the jury would be warranted in believing the witness who testified to experiencing the pain. But when she testifies that she experiences pain, and undertakes to give the cause of the pain, or the cause of certain painful conditions, and introduces expert scientific witnesses to corroborate her, and, instead of corroborating her, they flatly contradict her, and swear positively that the cause to which she attributes her injury and pain is an impossible cause, and testify as to what the actual cause is; it would seem that, if there is anything at all in medical science, the

proof would be conclusive that the cause of the admitted condition was not the cause to which the condition was attributed by the suffering person. Applied to this case, it seems to be conclusively proven that the pelvic troubles were not caused by the accident; and as, under the instructions complained of, the jury might have found for the respondents for this item in the sum of \$600, and as the damages were not specified, it is impossible to tell what amount they did allow for this item.

It is also urged that the court erred in not sustaining the objection of appellant's counsel to certain remarks made by the attorney for the respondents. During the examination of the juror W. C. T. Fisher as to his qualifications to sit as a juror in the cause, and during his examination by counsel for the respondent, and after the juror had testified that he was a salesman in the employ of Safety Ladder Manufacturing Company, the following occurred:

"Q. Do you know Stirrat & Goetz? A. No, sir. I have heard tell of them, but I do not know them. Q. You say that you are now a solicitor; were you ever a solicitor for any indemnity insurance company at all? A. No, sir. Q. Never had anything to do with this kind of companies? A. No, sir."

These questions were objected to, and the objections overruled. It is the contention of the appellant that it was the intention of counsel for respondents to notify the jury that the contest here was between an indemnity company, rather than the local contractor, and the respondents. No brief has been filed by the respondents. Counsel were permitted to argue the case on the theory that a brief would be filed, but none has been filed. The contention of counsel in oral argument, however, was, as we remember it, that the object of this examination was to determine whether the respondents were liable to have imposed upon them a hostile juror, one who was, or had been, in the employ of an indemnity company, and therefore not desirable as a juror. There seems to

Apr. 1909]

Opinion Per DUNBAR, J.

be some reason in this contention. The statute allows each party to a civil action three peremptory challenges, and latitude enough should be given in the examination of a juror to enable the examiner to intelligently exercise these peremptory challenges, even though he may not be able to elicit sufficient to justify the rejection of the juror for cause. In cases of this kind, if it should appear that the purpose of the examination was to inform the jury that the burden of a judgment, if obtained, would fall upon an insurance company instead of the defendant, we would hold it such misconduct on the part of the attorney as would warrant a reversal. But we are not able to see that it so appears in this case, even taken in connection with the remarks of counsel concerning railroad doctors and surgeons.

There seems to be no reason for the contention that the appellant was not responsible for the condition of the streets. It is not denied that it entered into the contract with the city to do this work, or that the putting down of the plank which was the cause of the injury was the act of the appellant. Nor is there any testimony tending to show contributory negligence on the part of the respondent. The testimony is to the effect that the cars stopped at a regular stopping place; that is to say, it was a regular stopping place of the cars until after this accident occurred; that the respondent asked the conductor to let her alight at this regular stopping place; that she supposed that the boards which were placed there beside the cars formed an improvised platform for passengers to alight upon; and from all the circumstances shown in the case, this supposition, we think, was warranted.

It is also contended that the court erred in allowing the respondents to introduce a portion of the contract between the appellant and the city showing in effect that it was the duty of the appellant contractor to keep the streets in a safe condition and to give notice, by certain prescribed notices, of dangerous places. It is contended that, this not having

been pleaded, it is a variance between the pleadings and the proof. But we think this contention is really without merit, and that, if it was error, it was error without prejudice, for the complaint charges the appellant with entering into this contract with the city at a given time, and that the appellant was negligent in digging up and tearing out a crosswalk and planking in and along said street, and making the bed of said street a great distance from the lower step of a platform of any of the cars that might be running on said street, and in constructing the platform, which was so negligently and carelessly constructed that it was the cause of the injury complained of. Under the complaint, the negligence is so specifically charged that the whole matter of the appellant's responsibility is brought to its attention, and when the responsibility for the negligence claimed is charged in the complaint, proof establishing that responsibility does not constitute a variance.

But for the errors mentioned above, the judgment will be reversed and a new trial granted, unless the respondents shall, within ten days from the filing of the remittitur, consent to a modification of the judgment to the extent of \$600. In such case, the judgment as so modified shall be affirmed.

CHADWICK, FULLERTON, GOSE, and CROW, JJ., concur.

Apr. 1909]

Opinion Per MOUNT, J.

[No. 7664. Decided April 28, 1909.]

RACHEL I. PIERCE, *Respondent*, v. R. J. PIERCE,
Appellant.¹

DIVORCE—JUDGMENT—MODIFICATION—DILIGENCE IN APPLYING—CUSTODY OF CHILDREN—FITNESS OF PARTIES. Allegations as to unfitness of the wife to have the custody of children by reason of immoral acts prior to the trial of the divorce case, unknown to the husband at that time, are properly struck from a petition to modify a decree of divorce as to such custody, where the only showing of diligence was the bare allegation that the husband was unable by the exercise of reasonable diligence to procure any evidence of the matters, and he had delayed for two years in applying for modification of the decree.

SAME. The right of a divorced party to the custody of children must depend upon present moral conduct and the welfare of the children; not upon past delinquencies.

APPEAL—RECORD. Where the evidence is not brought up, it will be presumed to support the findings.

APPEAL—REVIEW—BURDEN OF SHOWING ERROR. Error in striking part of a pleading will not be presumed, and is cured by receiving evidence on the point.

APPEAL—RECORD—DIVORCE—CUSTODY OF CHILDREN. Error cannot be predicated upon awarding the custody of children without providing that they may be visited by a parent, where the evidence is not brought up on appeal.

Appeal from an order of the superior court for Spokane county, Huneke, J., entered December 3, 1907, denying an application to modify a decree of divorce as to the custody of children, after a hearing on the merits. Affirmed.

Warren W. Tolman and Berkey & Cowan, for appellant.
Danson & Williams, for respondent.

MOUNT, J.—This appeal is from an order denying the appellant's petition to modify a decree of divorce, which awarded the respondent the care and custody of two minor children. On March 30, 1905, a decree was entered in the

¹Reported in 101 Pac. 358.

superior court of Whitman county, divorcing the appellant and the respondent and awarding to respondent the sole custody of the two minor children, Roy Elliott Pierce and John Edgar Pierce. Thereafter, in July, 1905, a motion was filed for the modification of the decree in regard to the custody of the children. This motion was denied upon the ground, among others, that the appellant was then in contempt of court, having spirited the children out of the jurisdiction of the court. See, *Beatty v. Davenport*, 45 Wash. 555, 88 Pac. 1109, 122 Am. St. 937.

Subsequently, in July, 1907, the appellant filed a petition to modify the decree as to the custody of the children, and the cause was removed to Spokane county. This petition alleged that the respondent was not a fit person to have the custody of the children, and, among other things, alleged certain specified acts of immorality as having occurred from the year 1901 to the year 1904, inclusive, and prior to the trial of the divorce case. The petition alleged that, at the time of the trial of the divorce case, the petitioner was ignorant of the facts, and was unable by the exercise of reasonable diligence to learn the same or procure any evidence thereof. The court upon motion struck these allegations from the petition. The allegations of the petition were then denied by the respondent, and after a trial the court found that the respondent was a fit and proper person to have the care and custody of the children, and thereupon denied the petition.

The appellant assigns three errors, viz., that the court erred (1) in striking the paragraph mentioned from the petition; (2) in not receiving evidence to sustain such allegations; and (3) in not making provision for appellant to see or visit the children.

We think the court did not err in striking the paragraph mentioned; for, if the general rule is that facts which could have been discovered with reasonable diligence before the trial may afterwards be shown to modify a decree with reference to the custody of the children, still there must be some

Apr. 1909]

Opinion Per MOUNT, J.

showing of diligence or excuse for negligence after the trial. This petition was not filed until more than two years after the trial. It alleged acts which occurred, if at all, from one to four years before the trial. We think this delay is not excused by a mere allegation that "your petitioner was unable by the exercise of reasonable diligence to procure any evidence whatsoever of the matters above related."

Furthermore, the court found that the respondent is a suitable and proper person to have the control and custody, and that it is to the interest of the children that the mother continue to have their sole care and custody, and that since said divorce the mother has been a kind and affectionate mother to the children, has at all times ministered to their wants, and has properly kept and provided for them. In cases of this kind, the primary object to be attained is the welfare of the children. "To this object the claim and personal desires of the parents, and even the wishes of the children, must yield." *Kane v. Miller*, 40 Wash. 125, 82 Pac. 177. "The mother's right to the child must depend upon her present conduct." *Curtis v. Curtis*, 46 Wash. 664, 91 Pac. 188. There is nothing in the record to show that the mother's conduct has not been the very best since she was divorced from the appellant. The evidence taken at the trial is not brought here. We must assume, therefore, that the findings of the court are proper, and that the best interests of the children require that the mother "should continue to have their sole care and custody."

Upon the second point, the appellant states in his brief that no evidence was received to cure the error made by striking the allegations of immorality before the divorce decree. Respondent states that the court did receive and consider evidence offered by appellant to sustain the allegations which were stricken. Of course, if evidence was received, the error, if any was committed by striking the paragraph referred to, was cured. *Jamieson & McFarland v. Heim*, 43 Wash. 153, 86 Pac. 165. Error will not be presumed; it

must affirmatively appear from the record. *Carpenter v. Barry*, 26 Wash. 255, 66 Pac. 393. In any event, we have seen above that the court did not err in striking the allegation. It follows that it was not error to refuse evidence to the same effect, even if evidence was not received.

It is lastly contended that the court erred in not making provision for the appellant to see or visit his children. This contention must necessarily rest upon the evidence, which is not here. There is nothing before us, therefore, from which we may determine this question. But from the record in *Beatty v. Davenport, supra*, which involved these same children, we may readily understand why the court refused to make a provision of that kind.

We find no error in the record, and the judgment is therefore affirmed.

RUDKIN, C. J., CROW, FULLERTON, and DUNBAR, JJ., concur.

CHADWICK, GOSE, MORRIS, and PARKER, JJ., took no part.

[No. 7293. Decided April 28, 1909.]

ALFRED I. FILION, *Appellant*, v. JAMES STEWART,
Respondent.¹

PRINCIPAL AND AGENT—LIABILITY OF AGENT TO PRINCIPAL—CONTROL OF ATTORNEY—ATTORNEY AND CLIENT. One acting as agent for a mortgagee in employing an attorney to foreclose a chattel mortgage cannot, after completion of the foreclosure, direct that the attorney withhold the sheriff's bill of sale from the mortgagee after she had bid in the property and paid the attorney his fees; since the mortgagee was the real client and entitled to the bill of sale.

Appeal from a judgment of the superior court for Clallam county, Still, J., entered January 25, 1908, dismissing an action for an injunction, after a trial on the merits before the court without a jury. Affirmed.

¹Reported in 101 Pac. 370.

Apr. 1909]

Opinion Per MOUNT, J.

Trumbull & Trumbull, for appellant.*A. W. Buddress*, for respondent.

MOUNT, J.—The appellant brought this action to restrain the respondent from delivering to one Amelia George a bill of sale of certain personal property. On a trial the lower court dismissed the action, and the plaintiff appeals.

The facts are these: Amelia George held a chattel mortgage against certain personal property. The appellant was appointed her agent or "trustee," for the purpose of foreclosing this mortgage, and the mortgage was assigned to him for that purpose. James Stewart, an attorney at law, was employed to foreclose the mortgage by notice and sale under the statute. There is some dispute as to who employed Mr. Stewart, the appellant testifying that he employed him, while Mr. Stewart testified that he was employed by Mrs. George through her husband. But that fact becomes immaterial, because it is conceded that appellant was acting merely as trustee for Mrs. George, and had no personal interest in the foreclosure; and therefore, even if Mr. Stewart was employed by Mr. Filion, the employment was for the benefit of Mrs. George.

In pursuance of his employment, Mr. Stewart prepared the necessary papers and directed the sale of the property by the sheriff of Clallam county, where the property was located. At the sale the property was bid in by Mrs. George for \$1,501, being much less than the amount due her on the mortgage. The property was delivered to her, but she paid no money to the sheriff. He refused to deliver to her a bill of sale until he received the money bid; but upon an order from Mr. Stewart, the sheriff executed a bill of sale to Mrs. George, which bill of sale was delivered to Mr. Stewart. Thereupon Mr. Filion paid Mr. Stewart for his services as attorney in the case, and discharged him, and at the same time demanded the possession of the bill of sale. Mr. Stewart refused to deliver the bill of sale to Mr. Filion, and insisted

that the same should be delivered to Mrs. George. This action was then brought by Mr. Filion to restrain Mr. Stewart from delivering the bill of sale to Mrs. George.

The appellant argues that, as soon as the respondent was discharged as an attorney, it was his duty to turn over all papers in his possession to his client, and this is true, as a rule. But in this case it is conceded that the appellant had no personal interest in the bill of sale, or in the property, or in the mortgage foreclosure. He was a mere agent or trustee for Mrs. George, who was really the interested client and was clearly entitled to the bill of sale without the payment of any money to the sheriff, because the amount of her bid was less than the amount due her. *State ex rel. Thompson v. Prince*, 9 Wash. 107, 37 Pac. 291; *Soderberg v. King County*, 15 Wash. 194, 45 Pac. 785, 55 Am. St. 878, 33 L. R. A. 670. Clearly, her agent, without any interest whatever, was not authorized to withhold from her the bill of sale, or any other right.

Appellant argues that the interest of Mrs. George in the mortgage was subject to a claim of some \$700 due the Citizens National Bank. If that question can be litigated in this case, the evidence clearly shows that Mrs. George had paid this claim before the mortgage foreclosure.

After reading the record, we are satisfied that there is no merit in the case. The judgment is therefore affirmed.

RUDKIN, C. J., DUNBAR, CROW, and FULLERTON, JJ., concur.

GOSE, CHADWICK, MORRIS, and PARKER, JJ., took no part.

Apr. 1909]

Statement of Case.

[No. 7563. Decided April 28, 1909.]

EMILY A. GOMM, *Respondent*, v. OREGON RAILROAD &
NAVIGATION COMPANY, *Appellant*.¹

CARRIERS—OF PASSENGERS—LIABILITY OVER CONNECTING LINES. The liability of a common carrier issuing a ticket over its own and connecting lines, is limited to its own line, in the absence of a special agreement.

CARRIERS—PASSENGERS—BAGGAGE—TICKETS—RESTRICTING LIABILITY—LOSS ON CONNECTING LINE. Where a railroad company sold a round-trip ticket for continuous passage over its own and connecting lines, and checked baggage to the point of destination, its conduct is inconsistent with a provision in the ticket that it acted only as agent for the connecting carrier and assumed no responsibility for baggage beyond its own line, and it is liable for the loss of baggage on the connecting line on the return trip; since such contracts are to be construed in the light of public policy and all the attending circumstances, the ticket itself not being the only evidence.

SAME. In such a case, the passenger has a right to assume that the return trip will be on the same conditions; and, where the connecting carrier issued only its local check for the baggage without calling attention to the fact that it was not checked through, the contracting carrier is liable for the resulting loss of the baggage; since it knew that if she stopped over en route to re-check the baggage the passenger would forfeit her ticket.

SAME—TICKET LIMITING VALUE OF BAGGAGE. A condition in a special excursion ticket, sold at less than the usual fare, limiting the liability of the carrier for loss of baggage to \$100, is a reasonable one, and will be enforced by the courts.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered April 17, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover the value of baggage lost in transit over defendant's railroad. Affirmed.

W. W. Cotton, W. A. Robbins, and Samuel R. Stern, for appellant.

O. J. Saville and P. C. Shine, for respondent.

¹Reported in 101 Pac. 361.

CHADWICK, J.—On June 21, 1907, the plaintiff purchased from the Oregon Railroad & Navigation Company, at Spokane, Washington, an excursion ticket, at a price less than the usual fare, entitling her to transportation with a reasonable amount of baggage over the lines of the Oregon Railroad & Navigation Company from Spokane, Washington, to Portland, Oregon, and from Portland, Oregon, to Albany, Oregon, over the lines of the Southern Pacific Company, and from thence over the line of the Corvallis & Eastern Railroad Company, to Newport, Oregon, and return over the same lines. The contract part of the ticket was as follows:

“In issuing and selling this ticket for passage over other transportation lines The Oregon Railroad and Navigation Company acts only as agent for such lines, assumes no responsibility beyond its own line, and assumes no liability either for itself or for the lines represented on this ticket, for baggage except for wearing apparel, and then only for one hundred dollars in value, unless a contract in writing is made for a greater value. This ticket is void unless officially stamped and dated, and the coupons belonging to this ticket will be void if detached.”

A coupon was attached which was, in effect, an order on the Southern Pacific Company for a ticket over its line from Portland, Oregon, and the Corvallis & Eastern to Newport and return. On the same day the plaintiff left Spokane and pursued her journey with an interruption of one day in Portland, Oregon, occasioned by the fact that no trains ran on the Corvallis & Eastern road on Sunday. Her baggage was checked to Newport by the Oregon Railroad & Navigation Company. She left Newport on the 11th day of September, 1907. The agent of the Corvallis & Eastern road at Newport gave her a local check that, in so far as the railroad companies engaging to carry this passenger are concerned, was good only over the line of that road. However, plaintiff swears—and her testimony is not contradicted in that behalf—that the word “Spokane” was marked on the local check as the destination of her baggage. She arrived in Spo-

Apr. 1909]

Opinion Per CHADWICK, J.

kane a day or two later, and presented her check to the local agent of the Oregon Railroad & Navigation Company. The company was unable to deliver the baggage, and undertook to recover it for her. The baggage was not found, and plaintiff began this action to recover its value, which she alleged to be in the sum of \$500. Defendant denied all liability, and set up the particular defenses that, in selling the ticket to Newport and return, it merely acted as the agent of the connecting carriers; that its relation to the transaction was clearly set forth in the conditions printed in the body of the ticket; that it is not shown that the baggage ever came into the possession of appellant, and for these reasons plaintiff had no right of recovery against it. From a verdict in favor of the plaintiff for the sum of \$500, defendant has appealed.

Without speculating on the various questions that have been entertained in the cases, and which have led to hopeless contrariety of opinion as to the effect to be given to the passenger's knowledge, or lack of knowledge, or opportunity to know the character and effect of the contract printed on a railroad ticket, and the extent to which the common law liability to transport a passenger to his destination may be limited by special contract, we shall assume, for the purposes of this opinion, that the respondent had full knowledge of all the conditions, reserving the question whether the attempt of the appellant to limit its liability to losses occurring on its own line, was, considering the facts presented in the record, effectual to accomplish its purpose. It seems to be settled by practically all of the cases that it is the duty of the carrier issuing a coupon ticket, in the absence of any special contract limiting its liability, to carry the passenger only to the end of its line and deliver to the next carrier in the route beyond.

"This rule of liability is adopted generally by the courts in this country, and is in itself so just and reasonable that we do not hesitate to give it our sanction." *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. 318, 21 L. Ed. 297.

And in *Ogdensburg etc. R. Co. v. Pratt*, 22 Wall. 123, 22 L. Ed. 827, it was said: "The fair result of the American cases limits the carrier's liability as such, when no special contract is made, to his own line." The cases were followed in *Myrick v. Michigan Cent. R. Co.*, 107 U. S. 102, 1 Sup. Ct. 425, 27, L. Ed. 325, where it was said:

"In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence."

These cases were followed in *Pennsylvania R. Co. v. Jona*, 155 U. S. 333, 15 Sup. Ct. 136, 39 L. Ed. 176. It is also a rule well within the great weight of authority, that the nature of the contract must be determined by a consideration of all the circumstances attending the particular case presented, and that the ticket itself is not the only evidence that may be introduced and considered; for, notwithstanding the form of the ticket and the construction put upon it by the carrier, circumstances may be such as to imply an entirely different contract. *Pennsylvania R. Co. v. Loftis*, 72 Ohio St. 288, 74 N. E. 179, 106 Am. St. 597. In fact, the most striking incident of our present inquiry is that each case involving the reasonableness of conditions printed upon railroad tickets has been determined not as an abstract proposition, but rather by their application to the particular facts disclosed in the instant case.

The principal question for our determination is the legal effect of the contract above quoted. The interest of the public in the matter and manner of the transportation of passengers or goods is such that all contracts limiting liability, made or attempted to be made by the carrier, will be construed in the light of public policy. A part of the burden of properly disposing of this case is overcome by the case of *Allen & Gilbert-Ramaker Co. v. Canadian Pac. R. Co.*, 42 Wash. 64, 84 Pac. 620, which commits this court to this doc-

Apr. 1909]

Opinion Per CHADWICK, J.

trine. While there have been a number of cases cited that are seemingly in point, we think the limitation clause of the contract now before us should be construed with reference to the principal engagement and conduct of the appellant. It would be manifestly unfair and unjust, under the facts of this case, to hold that a carrier could sell a ticket for continuous passage to a certain point on or over the lines of connecting carriers, and at the same time limit its liability to answer only for loss of baggage occurring on its own road. The general rule is that a through ticket, whether over one line or over the lines of connecting carriers, entitles the passenger to an entire trip and to have his baggage checked through to his destination. A through contract as to a passenger is a through contract as to his baggage. Hutchinson, Carriers (3d ed.), 1296. In the case at bar appellant became the contracting party. It undertook to provide respondent with passage from Spokane to Newport, Oregon, and return, over its own line, the Southern Pacific in Oregon, and Corvallis & Eastern Railroad Company. It fixed the condition that the trip should be continuous, and checked her baggage to its destination. It assumed to make the contract for itself as well as the connecting carriers. The condition requiring a continuous passage relieved the contract of the rule generally applied to coupon tickets, where a passenger may pursue his journey at his own pleasure, checking his baggage from place to place, thus taking it out of the control of the contracting carrier. A coupon ticket does not import a continuous passage, and the rule of law applicable to ordinary coupon tickets should not be made to apply to a case like the one before us. Hutchinson, Carriers (3d ed.), 1049. Respondent had a right to assume that, having to meet the same condition on the return trip, she would have the same privilege of checking and the same protection for her baggage through to her destination in returning, that she had in going. The Corvallis & Eastern road accepted the passenger and her baggage

upon the terms fixed by the first carrier; that is, a round trip excursion ticket calling for a continuous passage with her baggage, and was bound in law to return her upon the same terms and with like privilege as had been given her by the appellant at Spokane. It did not do so. It gave her a local baggage check, good only over its own line, without calling her attention to its character, knowing that if she stopped over at any way point or junction to re-check her baggage, she would forfeit her ticket. This condition was within the knowledge of appellant when it became the contracting party, and whatever its attempt to make itself an agent of the connecting carrier may have been as between the carriers themselves, it became as to the respondent a principal, and liable to her as a guarantor that she and her baggage would be returned to her home under the same conditions as it had in fact transported her. She is not bound to go seeking for her baggage or for the negligent carrier. While the Oregon road would in our judgment be also liable to answer for its negligence, respondent can sue on her contract, and that we have shown was with the appellant.

In the case of *Allen & Gilbert-Ramaker Co. v. Canadian Pac. R. Co.*, *supra*, speaking to this point, the court said:

"In fact, it seems to us that to deny this right to the shipper would be equivalent to a denial of justice at the hands of the law. The money is paid in one lump sum. The equitable distribution of this money is not within the province of the shipper. He has no way of ascertaining what the contract is between the different connecting lines in relation to their recompense or responsibility, and if his goods are lost or damaged he is relegated to a search across the continent to obtain information as to the responsibility of the different carriers for the damage, information which, in many cases, would be entirely unavailable. He has no way of accompanying the goods to look after them himself; probably would not be allowed to do so, under the transportation rules of the different companies, if he were so inclined. He deals with one company, which accepts his goods, receipts him for the same, and contracts to carry them to their destination; and any

Apr. 1909]

Opinion Per CHADWICK, J.

rule which would throw upon him the difficulties we have suggested would be unnecessary and inequitable."

Escape from this reasoning is sought in the suggestion that a different rule prevails between the carriers of freight and baggage, in that a passenger accompanies his baggage and can look out for it. While in theory this may be true—it has been so decided by some courts—yet in fact and practice nothing can be further from the truth. To undertake to look after baggage under modern conditions of travel would put an impossible burden on the passenger, and an attempted compliance on the part of the traveling public would result in a condition intolerable to the railroad companies. In the case of *Atchison etc. R. Co. v. Roach* (35 Kan. 740), 27 Am. & Eng. R. R. Cases 257, cited by appellant, it was held that the last carrier was not liable for the loss of baggage, in the absence of a showing of such community interest as would make the carriers partners *inter sese*, and that the sale of a through ticket over the route by the connecting carriers, and the checking of baggage to the end of the route without other evidence to show the relations of the companies, would not bind the last carrier as a principal. Without admitting the rule, it seems to us that the difference between that case and this is suggested by the conclusion reached by the court. The argument made to exempt the last carrier would bind the first carrier had it been the defendant. The court said:

"The theory that the defendant company was the original contracting carrier finds no support in the testimony, and no liability arises against the company on that ground. Where, then, is the liability? It is contended by the railroad company that the New York, Lake Erie & Western R. Co., being the first carrier, is alone liable. While a railroad company cannot be compelled to transport to a point beyond its own line, it is well settled that it may lawfully contract to carry persons and property over its own and other lines, to a destination beyond its own route; and when such a contract is made, it assumes all the obligations of a carrier over the

connecting lines as well as its own. In such cases the connecting carriers engaged in completing the carriage are deemed to be agents of the first carrier, for whose negligence and default the contracting carrier becomes liable. *Berg v. Atchison, T. & S. F. R. Co.*, 30 Kan. 561; s. c. 16 Am. & Eng. R. R. Cases, 229; Lawson, Carr, § 235; Hutch. Carr, § 145; Thomp. Carr. 431; 2 Rorer, R. R. 1234. Of course, a railroad company, or other common carrier, may limit its liability to the loss or injury occurring on its own line, and the understanding or contract between the parties is to be determined from the facts of each case. Some of the courts have held that the mere acceptance of the property marked for transportation to a place beyond the terminus of the road of the accepting carrier amounts to an undertaking to carry to the ultimate destination, wherever that may be, and, in the absence of any conditions or limitations to the contrary, will make it liable for loss occurring upon connecting lines as well as its own; while others hold that in such a case the carrier is only bound to safely carry to the end of its own route, and there to deliver to the connecting carrier for the completion of the carriage. Lawson, Carr. §§ 238-240. But where a railroad company sells a through ticket, for a single fare, over its own and other roads and checks the baggage of the passenger over the entire route, more is implied, it seems to us, than in the mere acceptance of the property marked for a destination beyond the terminus of its own line. The sale of a through ticket, and the checking of the baggage for the whole distance, is some evidence of an undertaking to carry the passenger and baggage to the end of the journey. The contract need not be an express one, but may arise by implication, and may be established by circumstances, the same as other contracts. In Wisconsin a passenger purchased a through ticket from the Chicago & Milwaukee R. Co. from Milwaukee to New York City, and at the same time delivered her trunk to that company, and received therefor a through check to New York City. Upon arrival at New York, the trunk was found to have been opened and some of the articles taken therefrom. The supreme court, in ruling upon the effect of the railway company issuing the through ticket and check, stated that 'the ticket and check given by the Chicago & Milwaukee R. Co. implied a special undertaking by that company to safely transport and carry, or cause to

Apr. 1909]

Opinion Per CHADWICK, J.

be safely transported and carried, the plaintiff and her baggage over the roads mentioned in the complaint, from Milwaukee to the city of New York. This, we think, must, in legal contemplation, be the nature and extent of the contract entered into and assumed by that company when it sold the plaintiff the through ticket, and gave a through check for the trunk, and received the fare for the entire route.' *Can-dee v. Pennsylvania R. Co.*, 21 Wis. 589; *Illinois Cent. R. Co. v. Copeland*, 24 Ill. 332; *Carter v. Peck*, 4 Sneed, 203; *Railroad Co. v. Weaver*, 9 Lea 38; *Baltimore & O. R. Co. v. Campbell*, 36 Ohio St. 647; s. c., 3 Am. & Eng. R. R. Cas. 246; 2 Rorer, R. R. 1001. From the authorities, we conclude that the sale of a through ticket, for a single fare, by a railroad company, to a point on a connecting line, together with the checking of the baggage through to the destination, is evidence tending to show an undertaking to carry the passenger and baggage the whole distance, and which, in the absence of other conditions or limitations, and of all other circumstances, will make such carrier liable for faithful performance, and for all loss on connecting lines, the same as on its own. The liability of the first carrier does not necessarily relieve the defendant company from responsibility. Each carrier is liable for the result of its own negligence; and although the first carrier may have assumed the responsibility for the transportation to a point beyond its own route, any of the subsequent or connecting carriers to whose default it can be traced will be liable to the owner for the loss of his baggage. Hutch. Carr. § 715; *Aigen v. Boston & M. R. Co.*, 132 Mass. 423; s. c. 6 Am. & Eng. R. R. Cas. 426; *Railroad Co. v. Weaver*, 9 Lea 39."

The case of *Felder v. Columbia etc. R. Co.* (21 S. C. 35, 53 Am. Rep. 656), 27 Am. & Eng. R. R. Cases 264, is the one most relied upon by appellant. This was a case sounding in tort against the last carrier. We do not consider it in point. Another leading case upon which dependence is put is that of *Milnor v. New York etc. R. Co.*, 53 N. Y. 363. In that case the contracting carrier was sued for a loss occurring off of its line, and the court held it was not liable, on the theory that it acted as the agent of the negligent carrier merely for the purpose of selling its tickets. The force of this case as an

authority is probably overcome, if indeed the theory upon which it rests is not absolutely destroyed, by the later case of *Hutchins v. Pennsylvania R. Co.*, 181 N. Y. 186, 73 N. E. 972, 106 Am. St. 537, wherein the *Milnor* case was relied on, among others, by appellant, and cited as controlling in a dissenting opinion rendered by Justice O'Brien.

Reference to the innumerable cases against carriers upon the subject of liability for lost baggage or freight, shows that, if the last carrier is sued, it generally defends upon the ground that it was not a party to the contract, or that the goods did not come into its possession; whereas if the contracting carrier is sued, it usually defends upon the theory that it acted only as agent for the connecting carrier, and in the absence of a special contract or the disclosure of facts showing a partnership, it is not bound to answer; thus, in either event, binding the party damaged to the production of proof entirely beyond his control, and making his recovery almost if not absolutely impossible. He might have to go from one to the other, through all the connecting system, to find the responsible party. The only just rule is to bind the contracting carrier to its contract, where the facts in the given case warrant it, and to hold all other connecting carriers to answer for their negligence, in which event it would no doubt be necessary to show that the baggage had actually come into the possession of the negligent carrier.

Here appellant was the contracting party. It agreed in law to do all that the party paid for, and is held on the contract rather than on the theory of tort. The effect of the ticket issued to respondent was to deprive her of the opportunity of looking after her baggage. If it expected to put that duty upon her it should have so informed her. The conduct of appellant was inconsistent with the condition printed on the ticket, and raised an implied contract that her baggage would be returned in like manner as it had been forwarded. The nature of appellant's engagement was such as to make

Apr. 1909]

Opinion Per CHADWICK, J.

the delivery of the baggage of respondent to the Corvallis & Eastern Company a delivery to the appellant.

The court below allowed a recovery for the full value of the baggage as alleged by respondent. The fourth condition upon the ticket issued to respondent is as follows: "The baggage liability limited to wearing apparel not exceeding \$100 in value." In such cases the same rule applies to baggage as to freight, 6 Cyc. 663. It has been almost universally held that this condition, when attached to a ticket sold at a price below the usual fare, is a reasonable one, and will be enforced by the courts. The respondent's recovery should have been limited to the amount agreed upon. *Windmiller v. Northern Pac. R. Co.*, ante p. 613, 101 Pac. 225; *Jensen v. Spokane Falls & N. R. Co.*, 51 Wash. 448, 98 Pac. 1124; *Hill v. Northern Pac. R. Co.*, 33 Wash. 697, 74 Pac. 1054; *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; *The Priscilla*, 106 Fed. 739.

This case will therefore be affirmed, with instructions to the lower court to enter a judgment in favor of respondent for the sum of \$100. Appellant will recover its costs in this court.

RUDDIN, C. J., DUNBAR, MOUNT, and FULLERTON, JJ.,
concur.

CROW, GOSE, PARKER, and MORRIS, JJ., took no part.

[No. 7377. Decided March 1, 1909.]

THE STATE OF WASHINGTON, on the Relation of Oregon Railroad & Navigation Company et al., Respondents, v. RAILROAD COMMISSION OF WASHINGTON et al., Appellants.¹

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered February 19, 1908, after a hearing on the merits before the court without a jury, vacating and setting aside an order of the state railroad commission fixing certain freight rates. **Affirmed.**

John D. Atkinson, Attorney General, and J. B. Alexander, E. C. Macdonald, and I. B. Knickerbocker, Assistants, for appellants.

L. C. Gilman, for respondent Great Northern Railway Co.

B. S. Grosscup, for respondent Northern Pacific Railway Co.

PER CURIAM.—This is an appeal by the railroad commission of Washington from an order and judgment of the superior court of Thurston county, entered February 19, 1908, which judgment vacated and set aside an order made by the railroad commission on September 20, 1907, declaring the order of the commission to have been arbitrary, unreasonable, and unjust. The order of the commission which was set aside by the superior court had discontinued certain theretofore existing freight rates upon potato shipments, originating upon points on the railroad of the Oregon Railroad & Navigation Company, and on points on the railroad of the Spokane & Inland Railroad Company, and had also discontinued certain rates theretofore existing from points within the state of Washington on the Great Northern Railway Company in Eastern Washington, and destined to Tacoma via the Great Northern road to Seattle and the Northern Pacific from Seattle to Tacoma. The order of the commission had substituted, in place of the canceled rates, certain joint rates between certain designated points of origin on the Oregon Railroad & Navigation railroad and Seattle & International Railway to Seattle or Tacoma, and also substituted a joint rate between the Great Northern and Northern Pacific upon shipments originating in Eastern Washington on the Great Northern and going thence to Seattle via Great Northern, thence to Tacoma destination via Northern Pacific. The joint rates so promulgated were less than the rates which were abolished by the order of the commission.

There is no contention made by the respondents in relation to the unconstitutionality of the commission act, although the appellants in the case, doubtless presuming that that question would be raised, have filed an elaborate brief in defense of the commission act. But

¹Reported in 100 Pac. 860.

Mar. 1909]

Opinion Per CROW, J.

the respondents content themselves with arguing the merits of the case. The record in this case is exceedingly voluminous, comprising several large volumes and technical exhibits of all kinds. We have examined it with great care and much labor, and believing that no possible good could be accomplished by an analysis of the testimony in detail (which would require space beyond the reasonable limits of any ordinary opinion), we content ourselves by saying that, from the examination which we have made, we are of the opinion that the judgment of the lower court should be affirmed, and it is so ordered.

[No. 7603. Decided March 26, 1909.]

FRANK CONNELLEY, *Appellant*, v. GEORGE W. CUSTER, *Respondent*.¹

Appeal from a judgment of the superior court for King county, Morris, J., entered January 14, 1908, upon findings in favor of the defendant, in an action for an accounting. Affirmed.

Chas. M. Fouts and *Kitt Gould*, for appellant.

James Kiefer, for respondent.

CROW, J.—This action was commenced by Frank Connelley against George W. Custer, to dissolve an alleged partnership and for an accounting. It is conceded, that plaintiff had for some years been engaged as a contractor in building a certain class of houses, for which he had prepared plans and methods of work which made a considerable saving in construction and materially increased his profits; that on or about August 20, 1906, he formed a partnership in the business with the defendant, George W. Custer, who had theretofore been his employee; that from time to time the firm had numerous contracts for the erection of houses, all of which were substantially completed early in June, 1907; and that the plaintiff then contemplated a trip to Alaska. The plaintiff contends that he was to be gone only a short time, that the defendant was to continue the business for the firm; but that, upon plaintiff's return some two months later, the defendant refused to account for any profits of the business, or to recognize the continued existence of the partnership. The defendant contends that, early in June and immediately prior to the plaintiff's departure, the partnership was dissolved; that final settlement was then made; that all funds of the firm were divided except two small sums, one half of which the defendant agreed to pay to plaintiff's wife; and that by mutual agreement the business was thereafter conducted by the defendant alone, in his own name, and for his own benefit.

¹Reported in 100 Pac. 335.

The trial court made findings in favor of the defendant, and entered final judgment dismissing the action, without prejudice to the plaintiff's right to hereafter bring an action for an alleged conversion of partnership property by the defendant, and also without prejudice to the defendant's right to bring an action for an alleged counterclaim pleaded in his amended answer and cross-complaint, the evidence as to such matter had not having been heard, and the same not having been determined by the court. The plaintiff has appealed.

No question of law is involved on this appeal. The controlling assignments of error made by the appellant are that the findings are not sustained by the evidence. The trial court, in substance, found that the partnership had been organized; that prior thereto the appellant and respondent had prepared seventeen different plans and tracings of tenement houses, compiled in book form, and bills of materials required therefor; that the appellant had devised a scheme for cutting the materials for said houses at a saw-mill, and shipping them to the place where needed, there expediting the work and cheapening the cost of the building; that the partnership was continued from its formation until the 3d day of June, 1907, at which time the appellant and respondent made a settlement of the partnership business; that an equal division of its funds was made; that its affairs were then closed except that two sums of money still due the firm and uncollected were to be thereafter divided; that the settlement was had with a view to the departure of the appellant for Alaska; that the exact date of his return was not then fixed upon or determined; that the only unfinished business which up to that time had been secured by the partnership was the building of an addition to a certain factory, and that the contract therefor was, with the full knowledge and consent of the appellant, taken by the respondent in his own name and for his own personal benefit; that thereafter the respondent carried on the business on his own account, contributing his own capital, and obtaining the contracts mentioned in the complaint in his own name and upon his own account in pursuance of the dissolution of the firm; that from the evidence offered, the court was unable to make findings as to an alleged conversion of certain partnership property by the respondent, and was also unable to make a finding as to an alleged counterclaim pleaded by the respondent.

The principal issue of fact on the trial was whether the partnership was finally dissolved when the settlement was made in June, 1907, just prior to the appellant's departure for Alaska. On this question the evidence was conflicting, but the trial judge who saw the witnesses, heard them testify, and was in a position to pass upon their credibility, resolved the same in favor of the respondent.

Mar. 1909]

Opinion Per Curiam.

After a careful examination of the entire record, we conclude that the preponderance of the evidence sustains not only this finding, but all other findings made by the trial judge.

The judgment is affirmed.

RUDKIN, C. J., MOUNT, DUNBAR, and FULLERTON, JJ., concur.
CHADWICK and GOSE, JJ., took no part.

[No. 7730. Decided April 8, 1909.]

HIRAM H. RUST *et al.*, *Respondents*, v. GEORGIANA McMANUS,
Appellant.¹

Appeal from a judgment of the superior court for King county, Morris, J., entered February 10, 1908. Affirmed.

A. C. McDonald, for appellant.

Walter S. Fulton, for respondents.

PER CURIAM.—The facts in this case are identical with the facts in *Rust v. Kennedy*, No. 7719, *ante* p. 472, 100 Pac. 998, except that a different piece of land is involved. For the reasons there stated, the judgment in this case must be affirmed.

¹Reported in 100 Pac. 999.

ACTION—CONTINUED.

- Cancellation of written instrument, see **CANCELLATION OF INSTRUMENTS**.
- Injuries to passengers, see **CARRIERS**, 15-26.
- Against carrier for loss of or injury to live stock, see **CARRIERS**, 4-7.
- Delay, loss of or injury to goods or baggage, see **CARRIERS**, 3, 11-13.
- Breach of contract, see **CONTRACTS**, 4.
- Between members and corporation, see **CORPORATIONS**.
- For wrongful death, see **DEATH**.
- Setting aside judgment of divorce, see **DIVORCE**, 3-6.
- For divorce, see **DIVORCE**.
- Suits in equity, see **EQUITY**.
- By or against executors and administrators, see **EXECUTORS AND ADMINISTRATORS**.
- Setting aside sale, see **EXECUTION**.
- For loss by negligence in setting out fire, see **FIRES**.
- For false representations, see **FRAUD**.
- By minor for custody and society of wife, see **HUSBAND AND WIFE**, 3.
- On contract of indemnity, see **INDEMNITY**.
- Premature commencement of action for damages as bar to action on indemnity contract and bond, see **INDEMNITY**, 4.
- On policy of marine insurance, see **INSURANCE**.
- Bar by former adjudication, see **JUDGMENT**, 7.
- Cancellation of judgment, see **JUDGMENT**, 2, 4, 5.
- Injuries for negligence of landlord, see **LANDLORD AND TENANT**.
- Commencement within period of limitation, see **LIMITATION OF ACTIONS**, 2.
- Limitation of statute, see **LIMITATION OF ACTIONS**.
- By parents to annul marriage of minor, see **MARRIAGE**, 4.
- By servant for personal injuries, see **MASTER AND SERVANT**.
- Foreclosure of mortgage, see **MORTGAGES**.
- By or against firms, see **PARTNERSHIP**.
- On indemnity bond guaranteeing building contract, see **PRINCIPAL AND SURETY**.
- Determination of adverse claims to real property, see **QUIETING TITLE**.
- Reformation of written instrument, see **REFORMATION OF INSTRUMENTS**.
- By vendee for breach of contract of sale, see **SALES**, 4-7.
- On bonds of sheriffs, see **SHERIFFS AND CONSTABLES**.
- Form of and relief in action for specific performance, see **SPECIFIC PERFORMANCE**.
- Against street railroads for personal injuries, see **STREET RAILROADS**.
- Setting aside tax sale or judgment, see **TAXATION**, 2, 3.
- By purchaser for damages for breach of contract, see **VENDOR AND PURCHASER**, 14-16.
- For breach of contract for conveyance of land, see **VENDOR AND PURCHASER**, 5, 14-16.

ADJUDICATION:

Operation and effect of former adjudication, see JUDGMENT, 7.

ADMINISTRATION:

Of estate of decedent, see EXECUTORS AND ADMINISTRATORS.

ADMISSIONS:

As evidence in civil actions, see EVIDENCE, 1.

Judgment on, see JUDGMENT, 1.

ADVERSE POSSESSION:

Acceptance of tax paid by mistake as estoppel to assert adverse possession, see ESTOPPEL, 1.

1. **ADVERSE POSSESSION—ENTRY ON PUBLIC LANDS—GOOD FAITH—POSSESSION WITHOUT COLOR OF TITLE—SCHOOL LANDS—JUDGMENTS—PARTIES BOUND—PARTICIPATING IN TEST CASE.** There is no entry upon land in good faith under color of title, so as to constitute title by adverse possession, where it appears that defendants went upon the adjoining forty and attempted to file a homestead claim upon the whole tract, knowing that the state claimed the land; that the filing was successfully contested by the state in the land department, after which a test case was appealed by a neighboring settler to the United States supreme court and the decision affirmed, and the defendants contributed to the expense of such appeal and were interested in the result; since there could be no claim in good faith after the adverse decision of the contest, and defendants became bound by the judgment by participating in the appeal in the other test case. *Ramsey v. Wilson*..... 111
2. **ADVERSE POSSESSION—INCORRECT DEED—COLOR OF TITLE AND CLAIM OF RIGHT.** A deed incorrectly describing a tract constitutes color of title, and the grantees acquire title by adverse possession under claim of right, where they took possession of the land intended to be conveyed, and adversely held for fourteen years under the belief that they were in actual possession of property conveyed by the deed. *Schlossmacher v. Beacon Place Co.*..... 588
3. **ADVERSE POSSESSION—CLAIM OF RIGHT—SETTLEMENT ON PUBLIC LANDS—MISTAKE.** The settlement without color of title upon government land, in good faith, believing it to be such when it in fact belonged to a private owner, is not such a taking under "claim of right" as would constitute an adverse possession; since there is, in its inception, no disseizin by possession adverse to the government, and no claim of right thereafter upon discovering the mistake. (Overruling *Johnson v. Conner*, 48 Wash. 431, 93 Pac. 914.). *McNought-Collins Improvement Co. v. May*..... 632
4. **SAME—COLOR OF TITLE.** A void tax deed is sufficient color of title under the seven years statute of limitations with payment of taxes. *Lara v. Sandell*..... 53

ADVERSE POSSESSION—CONTINUED.

5. **ADVERSE POSSESSION—PAYMENT OF TAXES—PREREQUISITES.** Under Bal. Code, § 5503, the prerequisites to obtain title by adverse possession and payment of taxes are, (1) claim and color of title made in good faith, (2) actual notorious possession for seven successive years, and (3) payment of all taxes assessed during that time. *Lars v. Sandell* 53
6. **SAME—PAYMENT OF TAXES—TIME OF PAYMENT.** Bal. Code, § 5503, giving title by adverse possession for seven years, with payment of all taxes "during said time," does not require the lapse of seven years after the first payment of taxes, but only the payment of all taxes assessed during the period of adverse possession. *Lars v. Sandell* 53

AFFIDAVITS:

- As part of record on appeal, see **APPEAL AND ERROR**, 15.
- Of jurors on motion for new trial, see **NEW TRIAL**.

AGENCY:

- See **PRINCIPAL AND AGENT**.

AGREEMENT:

- See **CONTRACTS**.

ALIENATION:

- Of lands by Indians, see **INDIANS**.

ALLOTMENT:

- Of Indian lands, see **INDIANS**.

AMENDMENT:

- On appeal or writ of error, see **APPEAL AND ERROR**, 21.
- Harmless error in allowing trial amendment, see **APPEAL AND ERROR**, 35.
- Mechanic's lien claim, see **MECHANICS' LIENS**, 4, 5, 13.
- Of pleading, see **PLEADING**, 5.
- Of statute, see **STATUTES**, 3.
- Of complaint in action for breach of option contract, see **VENDOR AND PURCHASER**, 14, 15.

ANIMALS:

- Carriage of live stock, see **CARRIERS**, 4-7.

ANNULMENT:

- Of marriage, see **MARRIAGE**, 4.

ANSWER:

- When constitutes appearance, see **APPEAL AND ERROR**, 1.
- In pleading in action at law, see **PLEADING**, 2, 3.

APPEAL AND ERROR:

- Judgment on appeal as bar to subsequent action, see **ADVERSE POSSESSION**, 1.
- Costs on affirmance, see **Costs**.
- Criminal appeals, see **CRIMINAL LAW**, 12-14.
- Harmless error in allowance of attorney's fees in suit for divorce, see **DIVORCE**, 7.
- Costs on appeal from condemnation proceedings, see **EMINENT DOMAIN**, 13.
- Condemnation proceedings, see **EMINENT DOMAIN**, 9, 10, 13.
- Remedy by appeal or writ of error as barring habeas corpus proceedings, see **HABEAS CORPUS**.
- Harmless error in recitals of judgment, see **JUDGMENT**, 6.
- Enforcement of mechanics' lien, see **MECHANICS' LIENS**, 4, 11-13.
- Review of orders of railroad commission, see **RAILROADS**, 1, 2, 9.
- Duty of court to make findings, see **TRIAL**, 17.
- Harmless error in trial of civil action, see **TRIAL**, 4, 6, 15.
- Arguments and conduct of counsel, see **TRIAL**, 4, 5.

III. DECISIONS REVIEWABLE.

1. **APPEAL—DECISIONS APPEALABLE—DEFAULT AFTER SUSTAINING DEMURRER—DISMISSAL.** A judgment of dismissal, for default in amending a complaint, after sustaining a demurrer thereto, is appealable; since no exception was necessary to the order sustaining the demurrer and no further steps are necessary to secure a review, excepting an appeal. *Rayburn v. Abrams*..... 414
2. **APPEAL—ORDERS APPEALABLE—DENYING TEMPORARY INJUNCTION—INSOLVENCY.** Under Bal. Code, § 6500, an order denying a temporary injunction is not appealable unless the court has found the party against whom it is sought to be insolvent, although the court attempted to fix the amount of a supersedeas bond; nor could the denial be considered a final determination as to the sufficiency of the complaint where the record fails to show that a demurrer thereto was passed upon. *Masoero v. Campbell & Co.*..... 551

V. PRESERVATION OF GROUNDS.

3. **APPEAL—PRESERVATION OF GROUNDS—AMENDMENT OF PLEADINGS—OBJECTIONS.** Error cannot be predicated upon a verbal amendment to the complaint read into the record at the opening of the trial, allowing a larger recovery, where no objection was made in the court below. *Springfield Shingle Co. v. Edgecomb Mill Co.*..... 620
4. **APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS.** Error in commenting on the evidence is waived if not excepted to. *Manhattan Building Co. v. Seattle*..... 226
5. **APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS—RULINGS ON EVIDENCE.** Under Bal. Code, § 5054, an exception is not necessary where an objection is interposed and a ruling made on the offer of evidence. *Nelson v. Western Steam Navigation Co.*..... 177

APPEAL AND ERROR—CONTINUED.

6. SAME—EXCEPTIONS TO INSTRUCTIONS—NECESSITY. An exception to instructions to the jury on a certain subject is not necessary to predicate error on the exclusion of evidence thereon, after objection interposed and ruling made at the trial. *Nelson v. Western Steam Navigation Co.* 177
7. APPEAL—REVIEW—EXCEPTIONS TO INSTRUCTIONS. Error cannot be predicated on the refusal to give instructions, request for which was laid on the judge's table and not called to his attention until the jury retired, when the court offered to recall the jury to give the instructions, and counsel did not avail himself of the offer, merely contenting himself with stating an exception. *Scherrer v. Seattle* 4
8. APPEAL—PRESERVATION OF GROUNDS. Error cannot be predicated upon failure to make findings and conclusions where no request therefor was made or objections interposed. *Schlossmacher v. Beacon Place Co.* 583

VII. REQUISITES FOR TRANSFER.

9. APPEAL—NOTICE—PARTIES. Notice of appeal need not be served upon parties not appearing in the court below. *McDougall v. Bridges* 396

IX. SUPERSEDEAS OR STAY OF PROCEEDINGS.

10. APPEAL—DECISION—SUPERSEDEAS OF JUDGMENT OF SUPREME COURT ON APPEAL THEREFROM—UNITED STATES STATUTES—REQUIREMENTS. The judgment of the supreme court of this state is not superseded by the order of supersedeas signed by the Chief Justice on allowing a writ to the United States Supreme Court; since U. S. Rev. St. § 1007, further requires that service of the writ of error be made on the adverse party, and that the required bond be filed. *North Shore Boom & Driving Co. v. Nicomen Boom Co.* 564

X. RECORD.

11. APPEAL—RECORD—STATEMENT OF FACTS. In the absence of a statement of facts or bill of exceptions only errors predicated on the pleadings and orders can be considered. *Malfa v. Crisp*.... 509
12. SAME—FINDINGS IN EQUITY—NECESSITY. Incomplete or defective findings are not ground for reversal in an equity case, since no findings are necessary to support the decree. *Clambey v. Copland* 589
13. APPEAL—RECORD. Where the evidence is not brought up, it will be presumed to support the findings. *Pierce v. Pierce*..... 679
14. APPEAL—RECORD—DIVORCE—CUSTODY OF CHILDREN. Error cannot be predicated upon awarding the custody of children without providing that they may be visited by a parent, where the evidence is not brought up on appeal. *Pierce v. Pierce*..... 679

APPEAL AND ERROR—CONTINUED.

15. APPEAL—RECORD—STATEMENT OF FACTS—AFFIDAVITS. The supreme court will not review an appeal from an order quashing a writ of attachment, on a motion based upon affidavits, where the affidavits are not brought up by bill of exceptions or statement of facts. *McDonald v. Downing*..... 394

XIII. DISMISSAL.

16. APPEAL—DISMISSAL—TIME FOR MOTION. A motion to dismiss an appeal because of imperfections in the record comes too late, where after an oral argument, with the records before him, respondent's counsel had asked leave to file a brief and stipulated that a reply brief could be filed, and in his brief submitted the motion to dismiss. *State v. Craig*..... 66

XVI. REVIEW.

17. APPEAL—REVIEW—NONSUIT—CORRECT DECISION BASED ON WRONG GROUND. Upon appeal from a judgment of nonsuit, where the evidence is before the supreme court, the judgment will be affirmed if correct, considering all the evidence, although the trial judge based his ruling on an incorrect view of the law. *Kane v. Dawson*.... 411
18. APPEAL—REVIEW—UNNECESSARY QUESTIONS—CONSTITUTIONAL LAW. The supreme court will not pass upon a constitutional question that is not a material issue in the case. *State ex rel. Oregon R. & Navigation Co. v. Railroad Commission*..... 17
19. APPEAL—RIGHT TO ALLEGE ERROR—ISSUES NOT DETERMINED—MORTGAGES—FORECLOSURE—DEPOSITS. Upon the dismissal of an action to foreclose a mortgage because prematurely brought, the plaintiff cannot complain of an order requiring the payment of money voluntarily deposited by a defendant for a partial release, the right to which was not determined or in dispute, and which order did not affect the lien of the mortgage. *Coman v. Peters*..... 574
20. APPEAL—REVIEW—PROCESS—WAIVER OF SERVICE BY GENERAL APPEARANCE. Error assigned on the denial of a motion to quash service of a summons, is waived by a general appearance and pleading over to the merits. *Springfield Shingle Co. v. Edgecomb Mill Co.*.... 620
21. APPEAL—REVIEW—AMENDMENTS TO CONFORM TO PROOF. Upon an appeal, the complaint will be deemed amended to conform to the facts in an action tried by the court without a jury, where the evidence is brought up. *Gay v. Schaefer*..... 269
22. APPEAL—REVIEW—BURDEN OF SHOWING ERROR. Error in striking part of a pleading will not be presumed, and is cured by receiving evidence on the point. *Pierce v. Pierce*..... 679
23. APPEAL—REVIEW—DISCRETION—RULINGS ON PLEADINGS. Motions to strike and make a pleading more definite and certain are addressed largely to the discretion of the trial judge, whose rulings will not be reversed where no prejudice resulted. *Simons v. Cissna*..... 115

APPEAL AND ERROR—CONTINUED.

24. **APPEAL—REVIEW—EVIDENCE.** A verdict supported by evidence, although conflicting, will not be set aside on appeal. *Passage v. Stimson Mill Co.* 661
25. **APPEAL—REVIEW—VERDICT—INADEQUACY—NEW TRIAL.** The supreme court cannot disturb a verdict for damages to property and grant a new trial on the ground of the inadequacy of the verdict, where there was substantial evidence sustaining it, although the trial court might have done so. *Manhattan Building Co. v. Seattle* 226
26. **APPEAL—REVIEW—VERDICT.** After the refusal of a new trial below, the supreme court cannot set aside the verdict of a jury because against the preponderance of the testimony, if it is supported by substantial evidence, although it be but the evidence of a single interested witness. *Williams v. Bartz*..... 153
27. **APPEAL—REVIEW—VERDICT—CARRIERS.** The finding of a jury that a pass issued to an employee, whose duty took him over the line from place to place, was a part of the consideration for his services and not a gratuity, is conclusive where that was one of the principle issues in the case. *Harris v. Puget Sound Electric R.*..... 239
28. **APPEAL—REVIEW—FINDINGS OF FACT—SUFFICIENCY.** In the absence of the evidence, a finding of fact that a deed was given and intended as security for a debt is not bad as a conclusion of law. *Clamby v. Copland* 580
29. **APPEAL—REVIEW—DEFECTIVE FINDINGS—EFFECT—RECORD—EVIDENCE—PRESUMPTION IN SUPPORT OF JUDGMENT.** In an equitable action, incomplete or defective findings are not ground for reversal, where the evidence is not brought up, as it will be presumed that the evidence supports the judgment. *Gould v. Austin*..... 457
30. **APPEAL—REVIEW—FINDINGS.** On trial *de novo* on appeal of a will contest, findings of the trial court on conflicting evidence are to be reviewed by the supreme court on the record, and will be reversed if erroneous and the evidence is not equally balanced. *In re Palmer's Will* 644
31. **APPEAL—REVIEW—FINDINGS.** The findings of the trial judge upon evidence that is very conflicting will seldom be disturbed on appeal, where he had opportunities of determining the credibility of the witnesses not possessed by the appellate court. *Springfield Shingle Co. v. Edgecomb Mill Co.*..... 620
32. **APPEAL—REVIEW—FINDINGS.** Findings upon conflicting evidence will not be reviewed on appeal where the trial judge was much better able to judge the evidence, and the supreme court cannot say that the evidence preponderates in favor of the appellant. *Smyth v. Lance & Peters*..... 560

APPEAL AND ERROR—CONTINUED.

33. APPEAL—REVIEW—FINDINGS. Findings of a railroad commission as to the necessity of track connections will not be disturbed unless the supreme court is satisfied that they were not justified by the evidence. *State ex rel. Oregon R. & Navigation Co. v. Railroad Commission* 17
34. APPEAL—REVIEW—FINDINGS—CREDIBILITY OF WITNESS. In an action at law tried before the court without a jury, a finding of the trial court as to the credibility of a witness, who was discredited by cross-examination, will not be reversed on appeal, unless clearly against the evidence. *King County v. Whittlesey*..... 206
35. APPEAL—REVIEW—PLEADING—AMENDMENTS AT TRIAL—PREJUDICE. Error cannot be predicated upon allowing a trial amendment raising a new issue by an affirmative defense, unless the plaintiff makes a showing of prejudice. *Bowers v. Good*..... 384
36. SAME—FAILURE TO ASK PROPER QUESTION. Defendant cannot complain of the striking of an answer of a witness that he thought plaintiff was drunk, where he did not pursue the inquiry, or ask whether plaintiff was intoxicated. *Rangenier v. Seattle Electric Co.* 401
37. APPEAL—HARMLESS ERROR—EMINENT DOMAIN—PROCEEDINGS—EVIDENCE. Upon condemnation of leasehold interests for a regrade of streets, it is not reversible error to allow a witness to answer the question "and you did not include the filling in of the back yard simply to have something to do." *Manhattan Building Co. v. Seattle* 226
38. SAME. In such a case it is not error to refuse to allow a witness to state whether appellants' tenants were of such a class as would be obliged to stay during the regrade, where it had been shown that it would be impossible to keep more than half the tenants. *Manhattan Building Co. v. Seattle*..... 226
39. SAME—HARMLESS ERROR—EVIDENCE. It is harmless error to exclude impeaching evidence as to a witness who testified to a mere negative, and to no affirmative fact prejudicial to the appellant. *State v. Simmons*..... 132
40. APPEAL—REVIEW—HARMLESS ERROR. Error in the admission of evidence is harmless in actions at law tried without a jury. *Carney v. Vogel* 571
41. APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. Error on the admission of evidence is harmless on a trial *de novo* on appeal. *Springfield Shingle Co. v. Edgecomb Mill Co.*..... 620
42. APPEAL—REVIEW—HARMLESS ERROR. Where there is a trial *de novo* in the supreme court, error in the admission of evidence is harmless. *Davis v. Lee*..... 330
43. APPEAL—REVIEW—HARMLESS ERROR. Error in admitting evidence is harmless where the case is tried *de novo* on appeal. *Tausick v. Tausick* 301

APPEAL AND ERROR—CONTINUED.

44. **APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE—FACTS OTHERWISE ESTABLISHED.** It is not prejudicial error to strike the statement of a witness that he thought the plaintiff was drunk, where afterwards he was asked what indications made him know plaintiff's condition, and he answered that he smelled as if he was drinking whiskey. *Rangier v. Seattle Electric Co.*..... 401
45. **APPEAL—REVIEW—HARMLESS ERROR.** The admission in evidence of a contract, without proof of its execution, to show the relation of master and servant is harmless where the relation was established by other evidence. *Nelson v. Western Steam Navigation Co.*... 177
46. **APPEAL—HARMLESS ERROR—EVIDENCE.** Error in the admission of evidence otherwise fully established is harmless. *State v. Simmons* 132
47. **SAME—WITNESSES—COMPETENCY.** The competency of a physician who testified to the pregnancy of a prosecutrix is immaterial where the fact of pregnancy was not disputed. *State v. Simmons*..... 132
48. **APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS.** It is harmless error to instruct upon a question not involved in the case, where it was merely casual and leading up to the other instructions, and it plainly appears to have been without prejudice. *Scherrer v. Seattle* 4
49. **SAME.** Failure to limit the amount of recovery to the amount claimed is harmless where it appears from the instruction as a whole that the jury could not have been misled, and the verdict was less than the amount claimed. *Scherrer v. Seattle*..... 4
50. **APPEAL—REVIEW—HARMLESS ERROR—NOTICE OF SIGNING JUDGMENT.** Failure to give notice of the signing of findings and judgment, after a hearing on proposed findings and the taking of the same under advisement, is error without prejudice, where the party was deprived of no substantial right. *Gould v. Austin*..... 457

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

51. **APPEAL—DECISIONS—REMISSION OF ERRONEOUS ITEM.** Upon the erroneous submission to the jury of an item for \$600 damages, in an action for personal injuries in which the verdict does not disclose what portion was based on such item, the judgment must be reversed unless \$600 of the damages is remitted. *Hoyt v. Independent Asphalt Paving Co.* 672

APPEARANCE:

As waiver of error in service of summons, see **APPEAL AND ERROR**, 20.
 As conferring jurisdiction, see **COURTS**.
 Unauthorized appearance of attorney as ground for vacation of decree, see **DIVORCE**, 4.

APPEARANCE—CONTINUED.

1. **APPEARANCE—WHAT CONSTITUTES—ANSWER.** An answer reciting that "now comes the defendant" and alleging facts as a "full and complete and affirmative defense," constitutes a general appearance. *Springfield Shingle Co. v. Edgecomb Mill Co.*..... 620
2. **APPEARANCE—WHAT CONSTITUTES—FILING DEMAND FOR INTERROGATORIES.** The service by defendant of interrogatories, within twenty days, constitutes an appearance, under a liberal construction of Bal. Code, § 4886, providing that a defendant appears when he answers, demurs, or makes any application for an order, or gives plaintiff written notice of appearance. *State ex rel. Trickett v. Superior Court* 13

APPLIANCES:

Liability of employer for defects, see **MASTER AND SERVANT**, 5, 8, 9, 11-13.

ARGUMENT OF COUNSEL:

In civil actions, see **TRIAL**, 4, 5.

ASSESSMENT:

For maintenance of drainage district, see **DRAINS**.

For public improvements, see **MUNICIPAL CORPORATIONS**, 3-5.

ASSIGNMENTS:

Liabilities of assignee of indorsee of note, see **BILLS AND NOTES**, 2.
Mutual rescission of contract for assignment of lease, see **CONTRACTS**, 2.

Fraud as to creditors, see **FRAUDULENT CONVEYANCES**.

Of claim to debtor as settlement and payment, see **PAYMENT**.

Record of assignment of claim as notice, see **RECORDS**.

Transfer of title to property under conditional sale contract, see **SALES**, 8.

1. **ASSIGNMENTS—NOTICE TO DEBTOR—EQUITIES—SETTLEMENT.** The assignment of a claim to a third person, without notice to the debtor, does not deprive the debtor of equities subsequently arising by reason of payment to or settlement with the debtor. *Dial v. Inland Logging Co.* 81

ASSIGNMENTS FOR BENEFIT OF CREDITORS:

Preferring creditors as fraudulent conveyance, see **FRAUDULENT CONVEYANCES**.

ASSUMPTION:

Of debt in consideration of transfer of property, see **FRAUDS, STATUTE OF**, 1.

ATTACHMENT:

Review of ruling quashing writ as dependent on presentation of affidavits in record, see **APPEAL AND ERROR**, 15.

Transfer of property in fraud of creditors levying attachment, see **FRAUDULENT CONVEYANCES**, 1.

ATTORNEY AND CLIENT:

Liability for attorney fees on assumption of mortgage note by purchaser of mortgaged chattels, see **CHATTEL MORTGAGES**.

Argument and conduct of counsel at trial in criminal prosecution, see **CRIMINAL LAW**, 4.

Harmless error in allowance of attorney's fees in divorce suit, see **DIVORCE**, 7.

Authority of attorney to appear in divorce action, see **DIVORCE**, 4.

Attorney of plaintiff as purchaser at execution sale, see **EXECUTION**, 3.

Transfer of property to attorney for services as fraudulent conveyances, see **FRAUDULENT CONVEYANCES**.

Judgment upon admissions of counsel in opening statement, see **JUDGMENT**, 1.

Control of attorney by agent and liability to principal, see **PRINCIPAL AND AGENT**, 2.

Argument or conduct of counsel at trial in civil actions, see **TRIAL**, 3-6.

AUTHORITY:

Of broker, see **BROKERS**.

Of attorney to appear in divorce suit, see **DIVORCE**, 4.

Of wife to surrender community interest acquired by contract, see **HUSBAND AND WIFE**, 2.

Of agent to modify marine insurance policy by parol, see **INSURANCE**, 1.

Of agent, see **PRINCIPAL AND AGENT**, 3, 5.

AUTOMOBILES:

Injuries to passengers by collision with street car, see **CARRIERS**, 23, 24.

Collision with street car, see **STREET RAILROADS**.

BAGGAGE:

Liability for loss on connecting line, see **CARRIERS**, 11-14.

BAILMENT:

Carriage of goods, see **CARRIERS**, 3.

BANKS AND BANKING:

False representations by officer as to solvency of corporation, see **FRAUD**, 2, 3, 6, 8-12.

BANKS AND BANKING—CONTINUED.

1. **BANKS AND BANKING—LIABILITY FOR FRAUD OF OFFICERS.** A bank is not liable for false representations as to the credit of a corporation, made by one of its officers, on plaintiff's unsupported allegation that the representations were made by the officer in his official capacity for the bank, it appearing that plaintiff was referred to, and that he went to, and the representations were made by, the officer, and not the bank. *Simons v. Cissna*..... 115
2. **BANKS—NATIONAL BANKS—ACQUIRING TITLE TO REAL ESTATE—WHO MAY QUESTION.** The title to real estate taken by a national bank is not void, and is voidable only at the suit of the government. *Puget Sound National Bank v. Fisher*..... 246

BAR:

Premature commencement of action for damages as bar to action on indemnity bond, see **INDEMNITY**, 4.
Of action by former adjudication, see **JUDGMENT**, 7.

BENEFITS:

Assessment of benefits caused by construction of public improvements, see **MUNICIPAL CORPORATIONS**, 3-5.

BIDS:

Inadequacy as ground for vacating execution sale, see **EXECUTION**, 1.

BILLS AND NOTES:

Assumption of mortgage note by purchaser as including attorney's fees, see **CHATTEL MORTGAGES**.
Evidence of payment of debt by note, see **MECHANICS' LIENS**, 8.

1. **BILLS AND NOTES—DEFENSES—FAILURE OF CONSIDERATION.** A contract to furnish transportation over a proposed railroad, and a note given in consideration of the contract must be construed together, and failure of the company to construct the road is a good defense to an action on the note. *Gross v. Bennington*..... 417
2. **BILLS AND NOTES—ASSIGNMENTS.** One deraigning title to a note by assignment from the indorsee, takes subject to any defense that might be made against the indorsee. *Gross v. Bennington*.... 417
3. **BILLS AND NOTES—DEFENSES—FAILURE OF CONSIDERATION—BONA FIDE HOLDERS—NOTICE TO INDORSEE.** Where a bank, the indorsee of a note, gave a recommendation to the agent of a railroad to use in securing the note from the makers in consideration of proposed railroad construction, knowing that the railroad was bankrupt, the bank acquires the note with notice of its infirmity by reason of failure of the consideration for which the note was given. *Gross v. Bennington* 417

BONA FIDE PURCHASERS:

Of bill or promissory note, see **BILLS AND NOTES**, 3.

BONA FIDES:

Necessity for claim of title in good faith, see **ADVERSE POSSESSION**, 1, 3, 5.

BONDS:

Sureties on bonds, see **PRINCIPAL AND SURETY**.

Indemnity bonds, see **INDEMNITY**.

Liability on official bond, see **SHERIFFS AND CONSTABLES**.

1. **BONDS—OFFICIAL BONDS—ACTIONS—SHORTAGE DURING SUBSEQUENT TERM—EVIDENCE—RELEVANCY—COUNTY TREASURERS.** In an action upon the official bond of a county treasurer covering his first term of two years, to recover for a shortage during such term, books, records and accounts showing an entirely separate shortage during a second term following the first, are primarily irrelevant and inadmissible as proof of, or in corroboration of, the first term shortage; but their contents tending to explain certain items testified to on examination-in-chief are competent, if confined to throwing light on the first term. *King County v. Whittlesey*..... 206
2. **SAME—EVIDENCE—CROSS EXAMINATION OF EXPERT.** In an action upon an official bond, where the official's shortage rests upon the evidence of an expert accountant, cross-examination to discredit the witness and show mistakes in his accounting is legitimate, although going into matters of defense at variance with the theory permitted the plaintiff. *King County v. Whittlesey*..... 206

BOOMS:

Right to replevin logs taken from unlawful boom, see **LOGS AND LOGGING**.

BOUNDARIES:

Evidence to aid statutory description of county boundaries, see **STATUTES**, 1.

BREACH:

Of contract of sale, see **SALES**, 4-7.

Of contract for conveyance of land, see **VENDOR AND PURCHASER**, 5, 14-16.

BROKERS:

Admission of declarations of third party in action for commissions, see **EVIDENCE**, 1.

Signed contract to purchase as sufficient memorandum to satisfy statute of frauds, see **FRAUDS, STATUTE OF**, 2.

Agency in general, see **PRINCIPAL AND AGENT**.

Sales by brokers, see **SALES**, 2, 3.

Fraud of agent as ground for rescission of contract, see **VENDOR AND PURCHASER**, 1, 2.

BROKERS—CONTINUED.

1. **BROKERS—AUTHORITY—PRINCIPAL AND AGENT—SALES—BROKER AS AGENT OF PURCHASER—EVIDENCE—SUFFICIENCY.** A coffee broker, B., at San Francisco, is constituted defendant's agent to buy two certain lots of coffee from two coffee merchants, where it appears that defendant made an offer for coffee to L., a broker at Seattle, agent of B., which B. declined; that B. wired L. that he could buy, if unsold and accepted by telegraph, two certain lots at a certain price, which offer was communicated to defendant and accepted by wire from L. to B.; that B. relied on such acceptance, and purchased the lots from the merchants, who shipped direct to defendant, making delivery ex-warehouse according to the custom of traders, notifying defendant, who corresponded with the merchants with reference to the purchase. *Ankeny v. Young Bros.*..... 235
2. **BROKERS—ACTION FOR COMMISSION—AUTHORITY.** Where a broker was authorized to procure a purchaser who would assume assessments levied on the property he is entitled to commissions upon making a sale by the terms of which the purchaser was to deduct the assessment from the purchase price, which was not satisfactory to the owner. *Kane v. Dawson*..... 411
3. **SAME—TIME FOR CONTRACT.** An action for a broker's commission is properly nonsuited where it appears from the date of checks given as earnest money that the sale was not made within the life of the broker's authority. *Kane v. Dawson*..... 411

BUILDINGS:

- Bonds guaranteeing building contract, see **INDEMNITY**, 2, 3; **PRINCIPAL AND SURETY**.
- Affected by mechanics' liens, see **MECHANICS' LIENS**.
- Regulation of buildings, see **MUNICIPAL CORPORATIONS**, 6, 7.

BURDEN OF PROOF:

- To rebut *prima facie* case of negligence in carriage of live stock, see **CARRIERS**, 6.
- To overcome written record of settlement, see **COMPROMISE AND SETTLEMENT**, 1.
- To show payment of wages to corporate officer, see **CORPORATIONS**, 4.
- In criminal prosecutions, see **CRIMINAL LAW**, 1.
- To establish negligence of master, see **MASTER AND SERVANT**, 14.
- Shifting burden of proof, see **TRIAL**, 8.

CANCELLATION OF INSTRUMENTS:

- See **REFORMATION OF INSTRUMENTS**.
- Evidence of duress for cancellation of compromise, see **COMPROMISE AND SETTLEMENT**, 3.
- Rescission of contract, see **CONTRACTS**, 2.
- Action by stockholder to set aside corporate contract, see **CORPORATIONS**, 1.

CANCELLATION OF INSTRUMENTS—CONTINUED.

Vacation of divorce decree and settlement of property rights, see DIVORCE, 3-6.

Accrual of action to cancel deed made in trust, see LIMITATION OF ACTIONS, 1.

Removal of clouds from title, see QUIETING TITLE.

Rescission of contract of sale of land, see VENDOR AND PURCHASER, 1, 2, 5-7.

1. SAME—CONSIDERATION—ADEQUACY. A conveyance by an old couple of a farm of the value of about \$2,000 or \$3,000, and \$700 worth of farm implements and personal property, to the husband of a niece, who was their sole beneficiary in a will, is not void for inadequacy of consideration, where a life estate in the land was reserved, and the grantee agreed to work the place and share the profits in the chickens, board and lodge the grantors and the survivor for life, and pay a certain small monthly sum; especially where three prominent business men, friends of the grantors, advised the arrangement. *Balam v. Rouleau*..... 389
2. CANCELLATION OF INSTRUMENTS — WANT OF CONSIDERATION — DISAVOWAL OF TRUST. Deeds made by a mother to her son, without consideration and in trust so that she might not lose the property, are properly set aside at her suit when the son disavows the trust. *Garvey v. Garvey*..... 516
3. CANCELLATION OF INSTRUMENTS — DEEDS—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY. There is no evidence that undue influence, induced a conveyance of real and personal property, reserving a life estate in the land, in consideration of an agreement for support and pin money during the life of the grantors, where it appears that one of the grantors was sick and 70 or 80 years old, and executed the agreement after long consultation with three of his lifelong friends, prominent business men, who had no interest in the matter, and the same was carefully explained to his wife, a half-breed Indian, who was not coerced in any way and fully understood the matter, if capable of doing so. *Balam v. Rouleau*..... 389
4. CANCELLATION OF INSTRUMENTS — DEEDS — FRAUD—EVIDENCE—SUFFICIENCY. There is no such clear, unequivocal and convincing evidence as to warrant the setting aside of a quitclaim deed, on the ground that the grantor supposed it to be a guaranty of a debt, and signed it without reading because he did not have his glasses, and the grantor is guilty of negligence precluding relief, where it appears that he had lived in this country forty years, could read and speak English, was engaged in business, had average experience and had conveyed property, and did not read the deed or ask to have it explained; the cashier of the grantee testifying that the deed was given voluntarily as security for the debt. *Golle v. State Bank of Wilson Creek* 437

CANCELLATION OF INSTRUMENTS—CONTINUED.

5. CANCELLATION OF INSTRUMENTS—RESCISSION FOR FRAUD—ELECTION OF REMEDIES—LACHES—TIME FOR SUIT—REASONABLENESS. An action for the rescission of the sale of lands, for fraud of the agent in showing the wrong property, is not commenced within a reasonable time, and is waived by the election of the remedy for damages, where it appears that the agents sold plaintiff land for \$1,500, which had been listed with them at \$1,000, that in August 1906, the vendor informed the plaintiff that the land shown by the agents was not the land listed or sold to him, and in the spring of 1907, the plaintiff, before bringing the present suit, commenced an action against the agent for \$500 damages upon hearing that the listed price was \$1,000 instead of \$1,500, and prosecuted no appeal from an adverse decision in such action. *Smith v. Gray*..... 255

CARRIERS:

Excessive damages for personal injuries, see DAMAGES, 4-6.
 Delivery of goods to carrier as delivery to buyer, see SALES, 2.
 Liability of vendee for loss in transit after acceptance and delivery to carrier, see SALES, 3.
 Collision between street car and automobile, see STREET RAILROADS.

1. CARRIERS—REGULATION OF RATES—RAILROAD COMMISSION—PLEADING—COMPLAINT—ISSUES. In a proceeding before the state railroad commission to change freight rates, an order as to commodities not mentioned in the complaint is void, as the commission can change rates only upon complaint made and a full hearing. *State ex rel. Northern Pac. R. Co. v. Railroad Commission*..... 440
2. CARRIERS—REGULATION—FREIGHT RATES—POWER OF RAILROAD COMMISSION—MAXIMUM RATES—EFFECT—STATUTES—REPEAL—CONSTRUCTION. The constitutional provision requiring the legislature to establish reasonable maximum transportation rates, does not prevent the delegation of such power to a railroad commission, since it further provides that the legislature may establish a railroad and transportation commission and define its powers; hence it does not prevent the establishment of a regulative commission with power to fix maximum rates in conflict with the maximum rate laws, and Laws 1907, providing such a commission, impliedly repeals former maximum rate laws of the state, upon the taking effect of conflicting rates established by the commission. *State ex rel. Great Northern R. Co. v. Railroad Commission*..... 33
3. CARRIERS—OF GOODS—LOSS IN TRANSIT—CONTRACT—RELEASED VALUE—LIABILITY FOR THEFT. Where, in order to secure a lower rate, a shipper of a case of furs, valued at \$3,000, enters into a contract to release the value to \$1 per pound, the carrier is not liable in excess of the released value for loss in transit, evidently by theft, on the theory that the theft must have been committed by an employee of some connecting carrier, for which the initial carrier would be responsible. *Windmiller v. Northern Pac. R. Co.*..... 613

CARRIERS—CONTINUED.

4. **CARRIERS—LIVE STOCK—NEGLIGENCE—VIOLATING LAW REQUIRING UNLOADING.** A railroad company is guilty of negligence in carrying horses that had already been on the road ten hours, and continuing the journey so as to make forty-five consecutive hours of travel without unloading, feeding, or watering, after repeated requests therefor, although it may not have been notified of the time they were on the road before it accepted the shipment; and irrespective of the Federal statute forbidding more than 28 consecutive hours' travel without unloading. *Pierson v. Northern Pac. R. Co.*..... 595
5. **SAME—DEATH OF HORSES—PROXIMATE CAUSE.** Negligence of a railroad company in carrying horses for forty-five consecutive hours without unloading for rest, food or water, is the proximate cause of their death, where they were so weakened and rendered susceptible to attack by disease that they sickened and died when unwittingly exposed to disease by their owners in endeavoring to bring them back to a normal condition. *Pierson v. Northern Pac. R. Co.*... 595
6. **CARRIERS—OF GOODS—DELAY IN SHIPMENT—STIPULATIONS IN CONTRACT—NEGLIGENCE OF DEFENDANT—BURDEN OF PROOF—PRESUMPTION FROM UNUSUAL DELAY.** The fact of unusual delay in the shipment of horses makes a *prima facie* case of negligence against a carrier, under a contract in which the shipper assumed all risks of delay in transportation, where it was recognized that the carrier could not relieve itself from acts of negligence by a further clause exempting the company from liability except for acts of negligence; since the cause of the delay is peculiarly a matter within the knowledge of the defendant and out of the reach of the plaintiff. *Jolliffe v. Northern Pac. R. Co.*..... 433
7. **SAME—DAMAGES FROM DELAY—EVIDENCE—SUFFICIENCY.** In an action for damages from unusual delay in shipping horses, causing shrinkage preventing immediate sale, the evidence of the amount of the damage sustained is sufficiently definite to make a case for the jury, where it appears that an unusual amount of shrinkage was caused by the delay, requiring the keeping and feeding of the horses a longer time than usual before they could be sold, costing at the rate of \$15 per month for care and keep. *Jolliffe v. Northern Pac. R. Co.* 433
8. **SAME—WHO ARE PASSENGERS—EMPLOYEE WITH PASS.** An employee having no duties on the train and traveling on a pass furnished in consideration of his employment, has paid his fare, and is a passenger, whether riding on the time of the company or not. *Harris v. Puget Sound Electric R.*..... 289
9. **SAME—WHO ARE PASSENGERS—BURDEN OF PROOF.** Where an employee is rightfully on a train as a passenger, he is entitled to be carried as such unless the waiver of his rights is shown. *Harris v. Puget Sound Electric R.*..... 298

CARRIERS—CONTINUED.

10. CARRIERS—FREE PASS—EXEMPTION FROM LIABILITY—EMPLOYEES.
Where a pass is issued to an employee as part of the consideration for his services, a clause exempting the carrier from liability for negligence is void as against public policy. *Harris v. Puget Sound Electric R.* 289
11. CARRIERS—PASSENGERS—BAGGAGE—TICKETS—RESTRICTING LIABILITY—LOSS ON CONNECTING LINE. Where a railroad company sold a round-trip ticket for continuous passage over its own and connecting lines, and checked baggage to the point of destination, its conduct is inconsistent with a provision in the ticket that it acted only as agent for the connecting carrier and assumed no responsibility for baggage beyond its own line, and it is liable for the loss of baggage on the connecting line on the return trip; since such contracts are to be construed in the light of public policy and all the attending circumstances, the ticket itself not being the only evidence. *Gomm v. Oregon R. & Navigation Co.*..... 685
12. SAME. In such a case, the passenger has a right to assume that the return trip will be on the same conditions; and, where the connecting carrier issued only its local check for the baggage without calling attention to the fact that it was not checked through, the contracting carrier is liable for the resulting loss of the baggage; since it knew that if she stopped over en route to re-check the baggage the passenger would forfeit her ticket. *Gomm v. Oregon R. & Navigation Co.* 685
13. SAME—TICKET LIMITING VALUE OF BAGGAGE. A condition in a special excursion ticket, sold at less than the usual fare, limiting the liability of the carrier for loss of baggage to \$100, is a reasonable one, and will be enforced by the courts. *Gomm v. Oregon R. & Navigation Co.* 685
14. CARRIERS—OF PASSENGERS—LIABILITY OVER CONNECTING LINES. The liability of a common carrier issuing a ticket over its own and connecting lines, is limited to its own line, in the absence of a special agreement. *Gomm v. Oregon R. & Navigation Co.*..... 685
15. SAME—NEGLIGENCE—FAILURE TO FLAG TRAIN—VICE PRINCIPALS. The negligence of a flagman to notify a train of another train approaching through a cut, is a nondelegable duty of the carrier, rendering the carrier liable to another employee traveling as a passenger, although other alleged acts of negligence were not proved. *Harris v. Puget Sound Electric R.*..... 289
16. CARRIERS—PASSENGERS—SETTING DOWN INTOXICATED PASSENGER. Where the jury, upon conflicting evidence, must have found that a street car was suddenly started while the plaintiff was in the act of alighting, the company would be liable for negligence causing injuries whether the plaintiff was drunk or sober. *Rangenier v. Seattle Electric Co.*..... 401

CARRIERS—CONTINUED.

17. SAME—INJURY TO PASSENGERS — ISSUES AND PROOF — GRADES—DESCRIPTION OF LOCALITY. In an action for damages from a head end collision of interurban electric cars, in a cut, it is not error to admit evidence as to the grades and curves not alleged in the complaint, when confined to the locality, and the jury are instructed at the time that it was only for the purpose of describing the situation at the place where the accident occurred. *Harris v. Puget Sound Electric R.* 289
18. CARRIERS — PASSENGERS — DERAILMENT OF CAR — PRESUMPTION OF NEGLIGENCE. The law presumes negligence from the breaking of an axle of a passenger coach whereby the car is derailed, and the burden of proof is upon the carrier to rebut the same. *Pate v. Columbia & Puget Sound R. Co.*..... 166
19. SAME—FACT OF ACCIDENT—PRESUMPTION. The fact of a collision between electric trains raises a *prima facie* case of negligence as regards a passenger on the train. *Harris v. Puget Sound Electric R.* 289
20. SAME—FREE PASS—IN CONSIDERATION OF WAGES—EVIDENCE—CUSTOM—ADMISSIBILITY. Upon an issue as to whether a pass issued to an employee, who was required to travel back and forth over the road, was in part consideration for his services, it is admissible to prove a general custom of the carrier to furnish transportation to such employees as a part of their wages, it being relevant to show that such a contract was probable. *Harris v. Puget Sound Electric R.* 289
21. SAME—QUESTION FOR JURY — EVIDENCE — SUFFICIENCY. Where a passenger coach is derailed by the breaking of an axle, evidence on the part of the defendant that its roadbed was in good condition, its cars and equipment properly inspected and its train carefully operated, does not show, as a matter of law, that it exercised due care, where there was other evidence tending to show that the train was operated at a high rate of speed and that the roadbed was rough and uneven. *Pate v. Columbia & Puget Sound R. Co.*..... 166
22. CARRIERS—PASSENGERS—EMPLOYEE RIDING ON PASS—EMPLOYMENT—QUESTION FOR JURY. In an action for injuries sustained by the son of the foreman of a bonder gang, riding to his work upon a pass granting transportation to the foreman and five employees, there is sufficient evidence to go to the jury on the question whether the foreman was authorized to employ the son, under a contract to pay \$1.50 a day and furnish transportation, where the boy testified that such was the contract and the pass showed on its face authority to carry other employees. *Harris v. Puget Sound Electric R.* 288
23. CARRIERS — CONTRIBUTORY NEGLIGENCE — AUTOMOBILES — IMPUTED NEGLIGENCE. The negligence of the driver of an automobile for hire

CARRIERS—CONTINUED.

- is not imputable to a passenger. *Wilson v. Puget Sound Electric R.* 522
24. **SAME—NEGLIGENCE OF PASSENGER IN AUTOMOBILE.** A passenger in an automobile for hire, riding beside the driver, is not guilty of contributory negligence in not warning, advising, or directing the driver in cases of emergency, or in not attempting to control the acts of the driver in passing other cars. *Wilson v. Puget Sound Electric R.* 522
25. **CARRIERS—OF PASSENGERS—PERSONS RIDING ON ENGINE—AUTHORITY OF ENGINEER—CONTRIBUTORY NEGLIGENCE.** Where a freight train is in charge of a conductor, and has in it a caboose for the carriage of passengers, one who rides upon the engine at the invitation of the engineer and without the knowledge of the conductor is guilty of contributory negligence and is not a passenger, although he rode there for fear he would not have time to board the caboose before the train started; as it is not within the scope of the engineer's authority to consent to carry passengers on the engine, and a man of mature years must take notice of that fact and of the impropriety of riding there. *Fischer v. Columbia & Puget Sound R. Co.* 462
26. **CARRIERS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS AS TO PROXIMATE CAUSE.** Upon an issue as to the contributory negligence of a passenger in alighting from a street car, an instruction allowing recovery if the plaintiff was not guilty of negligence "which was the proximate cause of the accident," is not erroneous in failing to qualify "proximate cause," when considered in connection with another instruction to the same effect referring to "any negligence on his part which proximately or naturally contributed to his injury, and without which such injury would not have happened." *Ran-genier v. Seattle Electric Co.* 401

CAVEAT EMPTOR:

Duty to inspect goods sold, see **SALES**, 5.

CERTIFICATE:

Filing of certificate of firm name as condition precedent to action, see **PARTNERSHIP**.
Effect of purchase of tax certificate by co-owner, see **TENANCY IN COMMON**, 1.

CERTIORARI:

Certifying evidence on review of order of railroad commission, see **RAILROADS**, 9.

1. **CERTIORARI—PROCEEDINGS—RIGHT TO INSTRUCTIONS—PARTIES INTERESTED—PROSECUTING ATTORNEY—DUTIES BEFORE GRAND JURY.** Instructions to a grand jury directing them, in effect, not to permit the prosecuting attorney or his deputy to take a stenographic report of the evidence of the witnesses produced before the grand jury, 46—52 **WASH.**

CERTIORARI—CONTINUED.

are not matters reviewable on certiorari at the instance of the prosecuting attorney, or orders directed against him in a proceeding in which he is a party in the sense that he would have any reviewable interest therein. *State ex rel. Pugh v. Superior Court*..... 484

2. **SAME—INSTRUCTIONS TO GRAND JURY—FORMALITY OF ORDERS REVIEWABLE ON CERTIORARI.** Such instructions stating the views of the court as to the grand jury's duty, not in the form of a final order or judgment against the prosecuting attorney, are not so specific or certain as to present any question for review on certiorari. *State ex rel. Pugh v. Superior Court*..... 484

3. **CERTIORARI—WHEN LIES — CESSATION OF CONTROVERSY—EXECUTED COURT MARTIAL.** Certiorari does not lie to review a sentence of a court martial reprimanding the relator, after the reprimand has been administered, the court dissolved, and the sentence fully executed, the relator not being deprived of any dignity or rank; as the controversy has ceased to exist. *State ex rel. Case v. Mead*. 533

CESSATION OF CONTROVERSY:

As affecting right to review sentence of court martial, see **CERTIORARI**, 3.

CHALLENGE:

Joinder of defendants in peremptory challenges to jurors, see **EX-
INENT DOMAIN**, 11.

CHARACTER:

Evidence of character of accused in criminal prosecutions, see **HOMICIDE**, 4.

CHARGE:

To jury in civil actions, see **TRIAL**, 11-16.

CHARTER:

Liability of general owners upon charter of vessel, see **MASTER AND
SERVANT**, 4.

CHATTEL MORTGAGES:

Assumption by purchaser of mortgage debt as agreement not within statute, see **FRAUDS, STATUTE OF**, 1.

Denial as insufficient to prevent judgment on pleadings in action on chattel mortgage, see **PLEADING**, 3.

Liability of agent in control of attorney in foreclosure proceeding see **PRINCIPAL AND AGENT**, 2.

1. **CHATTEL MORTGAGES—ASSUMPTION OF DEBT BY PURCHASER—ATTORNEY'S FEES.** The assumption of a mortgage note by the purchaser of mortgaged chattels, includes the attorney's fee provided for in the note. *Gay v. Schaefer*..... 269

CITIES:

See MUNICIPAL CORPORATIONS.

CLAIMS:

Effect of assignment to third person without notice to debtor, see ASSIGNMENTS.

Against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 6.

Against municipal corporation for injury in streets, notice of, see MUNICIPAL CORPORATIONS, 11-13.

Assignment to debtor as payment of claim, see PAYMENT.

Necessity for recording assignment of claim and effect of record as notice, see RECORDS.

CLOTHING:

As evidence in prosecution for homicide, see HOMICIDE, 7.

CLOUD ON TITLE:

See QUIETING TITLE.

Mortgage by strangers by mistake as cloud warranting rescission, see VENDOR AND PURCHASER, 7.

COLLATERAL ATTACK:

On sale of half interest of community property, see EXECUTORS AND ADMINISTRATORS, 3.

COLLISION:

Injury to passengers through collision of interurban railway, see CARRIERS, 15, 17, 19.

Between street cars or with vehicles, see STREET RAILROADS.

COLOR OF TITLE:

Necessity to sustain adverse possession, see ADVERSE POSSESSION.

COMMENT:

On rejected evidence, see TRIAL, 10.

COMMERCE:

Carriage of goods and passengers, see CARRIERS.

COMMINGLING OF POWERS:

Of powers 'by act creating regulative railroad commission, see RAILROADS, 8.

COMMISSIONERS:

Powers and proceedings of railroad commission, see RAILROADS.

COMMISSIONS:

Of broker, see BROKERS, 2, 3.

COMMON CARRIERS:

See CARRIERS.

COMMON PROPERTY:

See **JOINT TENANCY**.

COMMUNITY PROPERTY:

Jurisdiction to administer deceased wife's half only, see **EXECUTORS AND ADMINISTRATORS**, 3.

Division of community and separate property, see **DIVORCE**, 8.

In general, see **HUSBAND AND WIFE**, 1, 2.

Character of estate in lands patented to married men after enactment of community property law, see **JOINT TENANCY**.

COMPENSATION:

Of broker, see **BROKERS**, 2, 3.

Of corporate officer or agent, see **CORPORATIONS**, 2-5, 7.

Pecuniary compensation for injuries caused by unlawful acts of another, see **DAMAGES**.

For use of money, see **INTEREST**.

COMPETENCY:

Of experts as witnesses, see **EVIDENCE**, 3-7.

Of fellow employees, see **MASTER AND SERVANT**, 6, 10, 14, 15.

COMPROMISE AND SETTLEMENT:

See **PAYMENT**.

1. **COMPROMISE AND SETTLEMENT—PAROL EVIDENCE TO VARY WRITING—BURDEN OF PROOF.** Parol evidence to overcome the written record of a settlement must be clear, cogent, and convincing. *Burrows v. Williams* 278
2. **SAME—EVIDENCE—SUFFICIENCY—RESULTING TRUSTS.** Where a partnership or profit-sharing contract was settled by the acceptance of a give or take proposition, and deeds were made to the purchasing partners by the vendor of his interests in such of the real estate as was held partly in his name, there is no clear, cogent, and convincing testimony of an oral agreement to leave out of the settlement certain other tax title lands already held in the name of the purchasers, or to overcome the presumption of a full settlement and show a resulting trust in favor of the vendor, where by his testimony the vendor claimed that such oral agreement was made because of the expectation of a decision by the supreme court respecting the tax title and the consequent uncertainty as to its value; when in fact the tax deed had just been issued and suit to set it aside was not instituted by the former owners until six months later, after which and about two years later, the supreme court sustained the tax title, and during all that time the purchasers treated the tax title lands as their own and defended the suit at their own expense, the vendor taking no interest therein, and where the two purchasers flatly contradicted the testimony of the vendor. *Burrows v. Williams*..... 278

COMPROMISE AND SETTLEMENT—CONTINUED.

3. **COMPROMISE AND SETTLEMENT—VALIDITY—CANCELLATION—DURESS—EVIDENCE—SUFFICIENCY.** A compromise whereby an insurance company paid its agent \$5,000 cash and gave notes for \$15,000, in consideration of the surrender of stock and of an agreement for the agent's employment covering a long term of years, cannot be cancelled for duress in that the agent threatened litigation on account of his discharge and the appointment of a receiver, at a time when the company was in disfavor, where the parties dealt at arm's length, both had the advice of counsel, the compromise was ratified by the directors of the company, and no demand was made or steps taken to cancel the notes until after the lapse of six months; a threat of litigation or buying one's peace not ordinarily being duress. *Walla Walla Fire Insurance Co. v. Spencer*..... 369
4. **COMPROMISE AND SETTLEMENT—VENDOR AND PURCHASER—MUTUAL RESCISSION—SURRENDER OF CONTRACT—FRAUD—EVIDENCE—SUFFICIENCY.** The evidence is sufficient to sustain findings that purchase money returned, with interest and ten dollars additional, was in complete settlement of rights under a rescinded contract of purchase, without fraud, where it appears that the money was received while the parties were dealing at arm's length, and the vendors only stated their views of the vendee's rights under the contract, under circumstances disclosing their motives. *Bowers v. Good*. 384

CONCLUSIONS OF LAW:

Finding as, see **APPEAL AND ERROR**, 28.

CONCLUSIVENESS:

Judgment against city as binding on contractors and surety, see **INDEMNITY**, 6.

CONDEMNATION:

Taking property for public use, see **EMINENT DOMAIN**.

CONDITIONAL SALES:

See **SALES**, 8.

CONDITIONS:

Precedent to action by stockholder against corporation, see **CORPORATIONS**, 1.

Precedent to assessment for maintenance of drainage district, see **DRAINS**.

Precedent to action on policy of indemnity insurance, see **INDEMNITY**, 5.

On opening default, see **JUDGMENT**, 2.

Precedent to action against city, see **MUNICIPAL CORPORATIONS**, 11-13.

Precedent to action by partnership, see **PARTNERSHIP**.

Breach of condition on sale of goods, see **SALES**, 4, 5.

Precedent to action to annul tax judgment, see **TAXATION**, 3.

Precedent to action by vendee for breach of contract, see **VENDOR AND PURCHASER**, 14.

CONDUCT:

Of prosecutrix at other times as evidence, see **RAPE**, 1.

CONDUCT OF COUNSEL:

In criminal prosecutions, see **CRIMINAL LAW**, 4.

CONFIRMATION:

Of execution sale, see **EXECUTION**, 1, 3.

CONNECTING CARRIERS:

Liability of initial carrier for loss of baggage on connecting line, see **CARRIERS**, 11-14.

CONSIDERATION:

Failure of as defense in action on note, see **BILLS AND NOTES**, 1, 3.

Want of as ground for cancellation of instrument, see **CANCELLATION OF INSTRUMENTS**, 2.

Inadequacy as ground for cancellation of instrument, see **CANCELLATION OF INSTRUMENTS**, 1.

For deed, see **DEEDS**, 1.

CONSTITUTIONAL LAW:

Scope and extent of review of questions, see **APPEAL AND ERROR**, 18.

Regulation of carriers, see **CARRIERS**, 2.

Condemnation by power company and use of surplus power, see **EMINENT DOMAIN**, 3.

Assessments for local improvements, see **MUNICIPAL CORPORATIONS**, 3-5.

Validity of act conferring authority on railroad commission to compel trackage connections, see **RAILROADS**.

1. **CONSTITUTIONAL LAW—ENCROACHMENT ON JUDICIARY—RULE OF EVIDENCE.** Laws 1903, p. 244, § 2, providing that refusing or neglecting to pay a bill or surreptitiously removing baggage, shall be *prima facie* evidence of intent to defraud in contracting an innkeeper's bill, is not unconstitutional; as the legislature may prescribe the *quantum* and order of proof. *In re Milecke*..... 312
2. **CONSTITUTIONAL LAW—IMPRISONMENT FOR DEBT—FRAUDULENT CONTRACTION OF BILLS—INNKEEPERS—STATUTE—CONSTRUCTION.** Laws 1903, p. 244, making it a misdemeanor punishable by imprisonment for any person to fraudulently incur an innkeepers', boarding or lodging house bill or secure accommodations by false pretenses without paying for the same, or to surreptitiously remove baggage without such payment, does not violate Const., art. 1, § 17, prohibiting imprisonment for debt except in the case of absconding debtors; since the imprisonment is for the fraud committed. *In re Milecke* 312

CONSTITUTIONAL LAW—CONTINUED.

3. **CONSTITUTIONAL LAW—IMPRISONMENT FOR DEBT.** "Debt" within the meaning of the constitutional provision that there shall be no imprisonment for debt refers to contract obligations and not to obligations arising from fraud or in tort. *In re Milecke*..... 312
4. **CONSTITUTIONAL LAW—DUE PROCESS—PHYSICIANS—DENTISTRY—REQUIRING LICENSE—REASONABLENESS.** Requiring a diploma from a dental college as a prerequisite for examination for a license to practice dentistry does not violate the 14th Amendment and is not an unreasonable exercise of the police power, although there is no such college in the state, and although the applicant might be as qualified and able to pass the examination as any holder of a diploma. *State v. Littooy*..... 87

CONSTRUCTION:

- Of statute fixing transportation rates, see **CARRIERS**, 2.
- Of statute prescribing imprisonment for fraud in incurring inn-keeper's bill, see **CONSTITUTIONAL LAW**, 2.
- Of contracts, see **CONTRACTS**, 1.
- Of statute providing for rebate of customs duties, see **CUSTOMS DUTIES**.
- Of statute relating to assessments for maintenance of drainage district, see **DRAINS**, 1.
- Of contract for easement of right of way, see **EASEMENTS**, 2.
- Of statute relating to parties defendant in condemnation proceedings, see **EMINENT DOMAIN**, 5.
- Of contract of indemnity, see **INDEMNITY**, 1.
- Of Indian treaties, see **INDIANS**.
- Construction and effect of charter of vessel as to owner's liability, see **MASTER AND SERVANT**, 4.
- Mode of construing proceedings on foreclosure of mechanics' lien, see **MECHANICS' LIENS**, 9.
- Of ordinance regulating buildings in fire limits, see **MUNICIPAL CORPORATIONS**, 2.
- Of power of attorney to convey land, see **PRINCIPAL AND AGENT**, 3.
- Of statutes, see **STATUTES**.
- Of contract "to sell" land, see **VENDOR AND PURCHASER**, 3, 4.

CONTRACTORS:

- Liability of indemnitors on default of contractor, see **INDEMNITY**, 2, 3.
- Liability for negligence in causing defect in street, see **MUNICIPAL CORPORATIONS**, 9, 10.

CONTRACTS:

- Bills and notes, see **BILLS AND NOTES**.
- Compensation of broker, see **BROKERS**, 2, 3.
- Transportation of passengers, see **CARRIERS**, 10, 11-14, 20.
- Transportation of goods, see **CARRIERS**, 3.
- Limiting liability of carrier for negligence, see **CARRIERS**, 3, 6, 10, 11-13.

CONTRACTS—CONTINUED.

Compromise, see COMPROMISE AND SETTLEMENT.

Of contracts between officers and corporations, see CORPORATIONS, 2-8.

Acceptance of deed as merger of contract between parties to sell land, see DEEDS, 2.

For easement of right of way, see EASEMENTS.

Admissibility of declarations to show terms of contract with broker, see EVIDENCE, 1.

Offset and measure of damages for breach of contract for services in action by executor against maker of note, see EXECUTORS AND ADMINISTRATORS, 5, 6.

Action for value of poles cut under contract and lost by negligent setting of fire, see FIRES.

Agreements within statute of frauds, see FRAUDS, STATUTE OF.

Of husband or wife, see HUSBAND AND WIFE, 2.

Of indemnity, see INDEMNITY.

Of insurance in general, see INSURANCE.

Of marriage, see MARRIAGE.

Liability of agent to third party on default of principal, see PRINCIPAL AND AGENT, 4.

Bonds guaranteeing building contracts, see PRINCIPAL AND SURETY.

Sales of personalty, see SALES.

Specific performance, see SPECIFIC PERFORMANCE.

Sale of land, see VENDOR AND PURCHASER.

Rescission of sale of land, see VENDOR AND PURCHASER, 1, 2, 5-7.

1. CONTRACTS—CONSTRUCTION BY PARTIES—AMBIGUITY—EVIDENCE. Where a contract is ambiguous, evidence is admissible to show the construction placed on it by the parties. *Nelson v. Western Steam Navigation Co.* 177
2. CONTRACTS—RESCISSION—LANDLORD AND TENANT—LEASE—ASSIGNMENT. A contract for the assignment of a lease requiring the landlord's consent thereto is mutually rescinded where the landlord refused to consent to the assignment, the assignee was notified thereof, and the earnest money was returned by check, which the assignee accepted and held for seven months. *Sully v. Bushell*..... 536
3. CONTRACTS—FOR PERSONAL SERVICE—PERFORMANCE—DISCHARGE. A contract for personal services is discharged by the death of the party rendering the same. *Mendenhall v. Davis*..... 169
4. SAME—DAMAGES ON DEATH OF EMPLOYEE—SET-OFF AND COUNTERCLAIM. An action for damages will not lie for breach of a contract for personal services, caused by the death of the party employed, but the employer may, when sued by the estate for the sum agreed to be paid for the service, set-off or plead in bar the damages he has sustained, if any, by reason of deceased's failure to perform. *Mendenhall v. Davis* 169

CONTRIBUTORY NEGLIGENCE:

Of passenger, see **CARRIERS**, 23-26.

Of person injured by defect in street, see **MUNICIPAL CORPORATIONS**, 9.

CONVEYANCES:

See **ASSIGNMENTS**.

Of personalty as security for debt, see **CHATTEL MORTGAGES**.

In general, see **DEEDS**.

In fraud of creditors, see **FRAUDULENT CONVEYANCES**.

By husband or wife, see **HUSBAND AND WIFE**, 2.

By Indians, see **INDIANS**.

As security for debt, see **MORTGAGES**.

Title to vacated alley as parts of lots conveyed by deed, see **MUNICIPAL CORPORATIONS**, 8.

Authority of agent, see **PRINCIPAL AND AGENT**, 3, 5.

CORPORATIONS:

Acts of officers constituting dedication of park, see **DEDICATION**, 3.

Condemnation by electric power company, see **EMINENT DOMAIN**, 2, 3.

False representations as to solvency of, see **FRAUD**, 2, 3, 6, 8-12.

Municipalities, see **MUNICIPAL CORPORATIONS**.

Railroad companies, see **RAILROADS**.

1. **CORPORATIONS — ACTIONS — ON BEHALF OF CORPORATIONS — STOCKHOLDERS—CONDITION PRECEDENT—REDRESS IN CORPORATION.** A court of equity will not entertain a suit by stockholders to set aside a contract made by the officers of the corporation, alleged to be contrary to the interests of the corporation and made without authority, unless it is shown in the complaint that the stockholders have sought redress in the corporation, or that it would be fruitless for them to do so. *Elliott v. Puget Sound Wood Products Co.*..... 637
2. **CORPORATIONS — OFFICERS — COMPENSATION — CONTRACT FOR SERVICES—EVIDENCE—SUFFICIENCY.** It is sufficiently shown that the three directors of a company each owning one-third of the capital stock, were to devote their time to the company without other compensation than the anticipated profits, where it appears that there was no express contract to pay wages, and under the by-laws their duties were to be performed without payment other than for traveling expenses in the absence of a contract therefor, and plaintiff's filing of a claim for a lien for wages, and assignment thereof for about one-half the face value, without any demand made on the company, shows his bad faith; since a director cannot recover for services upon an implied contract, unless the services were clearly outside of his ordinary duties and it was well understood they were to be paid for. *Dial v. Inland Logging Co.*..... 81
3. **SAME—CONTRACT—DEFINITENESS.** A statement by a director of a corporation that he always reckoned wages to be deducted before computing profits, is too indefinite to constitute a contract to pay compensation for the services of a director. *Dial v. Inland Logging Co.* 81

CORPORATIONS—CONTINUED.

4. CORPORATIONS — CONTRACTS — EMPLOYMENT OF OFFICER — IMPLIED CONTRACT FOR WAGES—PAYMENT—BURDEN OF PROOF. An officer and stockholder owning only two shares of stock, who is employed to work for the company, is presumed to be entitled to reasonable wages, which he may recover or offset upon showing the rendition and value of the services; the burden of showing payment being upon the company. *Argo Manufacturing Co. v. Parker*..... 100
5. SAME. Where a corporation made salary payments to each of its officers from time to time, an officer devoting all his time to the business, as president and general manager, is entitled to offset any balance due for wages, at their reasonable value, against the value of material sold to him by the corporation. *Argo Manufacturing Co. v. Parker*..... 100
6. SAME — CONTRACTS — SALES BY GENERAL MANAGER TO HIMSELF—RATIFICATION. The sale of material to himself by a general manager of a corporation, is ratified by the corporation by suit brought to recover the value of the material. *Argo Manufacturing Co. v. Parker* 100
7. SAME — WAGES DUE STOCKHOLDERS—ESTOPPEL—RECITALS IN BILL OF SALE. In a bill of sale of the assets of a corporation, joined in by the stockholders, the recital that the corporation is in no way indebted to the stockholders operates as an estoppel against claims by the stockholders for wages due them from the corporation. *Argo Manufacturing Co. v. Parker*..... 100
8. CORPORATIONS — REPRESENTATION — STOCKHOLDERS. The fact that one of the stockholders of a corporation entered into a contract with reference to the use of the corporate name by a third person, is not constructive notice to the corporation of the terms of the contract. *Nelson v. Western Steam Navigation Co.*..... 177

CORROBORATION:

Of prosecutrix in prosecution for rape, see RAPE, 2, 3.

COSTS:

Condemnation proceedings, see EMINENT DOMAIN, 13.

In action on indemnity insurance policy, see INDEMNITY, 1.

1. COSTS—ON APPEAL—RENTS PENDING APPEAL. Where pending appeal a decree of divorce dividing the property is superseded, the rents and profits pending the appeal will, on affirmance, be offset against allowances made to the respondent, in view of which interest and costs may be disallowed by the supreme court on prompt payment of the judgment by appellant. *Sullivan v. Sullivan*..... 160

CO-TENANCY:

See JOINT TENACY; TENANCY IN COMMON.

COUNTIES:

Action on official bond for shortage of officer, see **BONDS**.

Evidence to aid statutory description of boundaries, see **STATUTES**, 1.

COURT MARTIAL:

Right to review of sentence after cessation of controversy, see **CERTIORARI**, 3.

COURTS:

Review of decisions, see **APPEAL AND ERROR**, 1, 2.

Statutes limiting jurisdiction as encroachment on judiciary, see **CONSTITUTIONAL LAW**, 1.

Jurisdiction to administer deceased wife's half only of community property, see **EXECUTORS AND ADMINISTRATORS**, 3.

Conclusiveness of judgments, see **JUDGMENT**, 7.

Province of court and jury, see **TRIAL**, 7, 8, 9.

1. **COURTS—JURISDICTION—QUIETING TITLE—VENUE**. In an action to quiet title to land alleged to be situated in a certain county where the suit was brought, and to set aside the tax deed of another county which assumed to assess the lands, the court in the first mentioned county has jurisdiction to bind all parties who appeared in the action. *Puget Sound National Bank v. Fisher*..... 246

CREDIBILITY:

Determination of court as to credibility of witness, see **TRIAL**, 9.

CRIMINAL LAW:

See **HOMICIDE**; **RAPE**.

Imprisonment for debt fraudulently contracted with innkeeper, see **CONSTITUTIONAL LAW**, 2-3.

Remedy by appeal as bar to habeas corpus proceedings, see **HABEAS CORPUS**.

Practicing dentistry without license, see **PHYSICIANS AND SURGEONS**.

Cross-examination of witnesses, see **WITNESSES**, 3.

1. **CRIMINAL LAW—DEFENSE OF INSANITY—BURDEN OF PROOF—INSTRUCTIONS**. Upon the defense of insanity it is proper to refuse to instruct that if the defendant's evidence raises a reasonable doubt as to his sanity, the state must remove the doubt by the preponderance of the evidence. *State v. Craig*..... 66
2. **SAME—EVIDENCE—HEARSAY**. It is inadmissible, as hearsay, for a prosecutrix to testify that a third person told her that the accused had said he would not continue relations with her. *State v. Craig* 66
3. **CRIMINAL LAW—EVIDENCE—INSANITY—NONEXPERT OPINION**. The testimony of nonexpert witnesses is competent to show insanity. *State v. Craig* 66

CRIMINAL LAW—CONTINUED.

4. CRIMINAL LAW—TRIAL—READING EVIDENCE. It is not reversible error for the prosecuting attorney to read a correct copy of the evidence to the jury, where the court at the time instructed that the jury were the exclusive judges of what the testimony was. *State v. Churchill* 210
5. CRIMINAL LAW—TRIAL—INSTRUCTIONS. It is not error to repeat the instructions on request of the jury. *State v. Churchill*..... 210
6. SAME—KNOWLEDGE OF ACCUSED. An instruction upon self defense directing the jury to consider "all" the facts and circumstances bearing on the question and surrounding defendant at the time, sufficiently includes defendant's "knowledge derived from personal observation." *State v. Churchill*..... 210
7. CRIMINAL LAW—DEFENSES—INSANITY—INSTRUCTIONS—CONTRADICTORY AND MISLEADING INSTRUCTIONS—PARTIAL INSANITY. Upon the defense of insanity, an instruction is contradictory and misleading where the jury is told that the defendant would not be accountable for his crime if he was suffering from mental disease so complete that every faculty and power of his mind was affected by it, and that in consequence he was not capable of a single sound, healthy mental action, although other instructions favorable to the defendant were given; since it denies to him the defense of partial insanity. *State v. Craig* 66
8. SAME—DEFENSE OF INSANITY—INSTRUCTIONS. The jury should be instructed that the test of defendant's sanity is whether he had sufficient capacity at the time to distinguish between right and wrong with reference to the act charged. *State v. Craig*..... 66
9. SAME—DEFENSE OF INSANITY—INSTRUCTIONS. Upon the defense of insanity, the power to choose between right and wrong being a relative question of fact to be determined by the jury, any instruction that invites the jury to go further than to answer the question, Had the accused sufficient capacity at the time to distinguish between right and wrong with reference to the act committed? or that leads the jury into unknown paths, is prejudicially erroneous, even though involved instructions may be regarded as more favorable to the accused than those requested; since he was *non compos mentis* and entitled to the protection of the law if he did not have the mental power to choose between right and wrong with reference to the act charged, and if such affection was the efficient cause of the act. *State v. Craig*..... 66
10. SAME. It is not error to refuse an instruction which, in legal meaning and effect, has already been given. *State v. Churchill*.. 210
11. CRIMINAL LAW—TRIAL. The jury may take the exhibits to the jury room, under Bal. Code, § 5004. *State v. Simmons*..... 132
12. CRIMINAL LAW—APPEAL—INSTRUCTIONS. Error cannot be predicated upon the failure of the court to define the word "feloniously," in the absence of any request therefor. *State v. Churchill*..... 210

CRIMINAL LAW—CONTINUED.

13. **CRIMINAL LAW—APPEAL—HARMLESS ERROR.** In a prosecution for manslaughter, it is harmless error to admit in evidence the details of a previous fight between the deceased and accused where the same was favorable to the accused. *State v. Churchill*..... 210
14. **CRIMINAL LAW—APPEAL—HARMLESS ERROR—RAPE.** In a prosecution for rape, the erroneous admission of evidence that defendant was married and that the prosecutrix was acquainted with his wife, is harmless. *State v. Simmons*..... 132

CROSS-EXAMINATION:

See WITNESSES, 2, 3.

CRUELTY:

Ground for divorce, see DIVORCE, 1.

CUSTODY:

Right of divorced party to custody of children, see DIVORCE, 9, 10.

Right of minor to society and custody of wife, see HUSBAND AND WIFE, 3.

CUSTOMS AND USAGES:

Delivery of goods ex-warehouse as delivery to buyer, see SALES, 2.

CUSTOMS DUTIES:

Payment and recovery by purchaser under vendor's warranty of sale, see SALES, 7.

1. **CUSTOMS DUTIES—REBATE—EXPIRATION OF TIME LIMIT FOR REBATE—STATUTES—CONSTRUCTION.** Foreign coal discharged in October, 1903, from a disabled vessel at a port other than her destination, and kept in the custody and control of the government, is not relieved from the payment of duty by Act of Cong. Jan. 15, 1903, (32 Stat. 773) which provides for a full rebate of duties on coal for the period of one year, where no entry of the coal had been made and no rebate made by the collector until after said statute had expired by limitation; and the same was subject to duty when sold on March 4th, 1904. *North American Commercial Co. v. North American Transportation and Trading Co.*..... 502

DAMAGES:

Remission of erroneous item on appeal, see APPEAL AND ERROR, 51.

For delay in shipping live stock, see CARRIERS, 7.

Liability under contract releasing value of goods lost in transit, see CARRIERS, 3.

For breach of contract by death of employee, see CONTRACTS, 4.

For death, see DEATH.

Admissibility of evidence to show damage by change of grade, see EMINENT DOMAIN, 8.

DAMAGES—CONTINUED.

Allowance of separate jury to assess damages as discretion of court, see **EMINENT DOMAIN**, 9, 10.

Offset and measure of damages for breach of contract for services in action by executor against maker of note, see **EXECUTORS AND ADMINISTRATORS**, 5, 6.

Measure of damages for deceit as to credit of corporation, see **FRAUD**, 11.

For breach by seller of contract for sale of goods, see **SALES**, 5, 6. In action on sheriff's bond, see **SHERIFFS AND CONSTABLES**.

1. **DAMAGES—MEASURE—FUTURE SUFFERING AND EARNING CAPACITY.** Where an accident resulted in the loss of a finger, with suffering and weakness at the time of the trial, it is proper to instruct the jury that they may take into consideration the probable future suffering and loss, if any, and probable future earning capacity, in assessing the damages. *Passage v. Stimson Mill Co.*..... 661
2. **DAMAGES—PERSONAL INJURIES—MEDICAL ATTENDANCE—WHEN RECOVERABLE—FREE HOSPITAL.** In an action for personal injuries, the plaintiff cannot recover the reasonable value of medical attendance and hospital charges furnished to him as a sailor free of charge at a marine hospital. *Nelson v. Western Steam Navigation Co.*... 177
3. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict will not be set aside as excessive when, if excessive at all, it was not so excessive as to be the result of passion or prejudice. *Scherrer v. Seattle* 4
4. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$4,000 for personal injuries sustained by a passenger is grossly excessive, and should be reduced to \$1,000, where the physical injury was slight, consisting of a grazed shin and a bruise on the knee and on the hip, and pains in the side were claimed to have developed three weeks later, the cause of which was problematic, and there was nothing to warrant a finding of permanent injury. *Pate v. Columbia & Puget Sound R. Co.*..... 166
5. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$2,000 for personal injuries sustained by a sailor and longshoreman, thirty-two years old, earning \$40 per month as a sailor, and capable of earning 40 or 50 cents per hour as longshoreman, is not excessive, where it appears that his toes were crushed and had to be amputated, that he suffered great pain, was in the hospital 2½ months and lost about six months' time, and cannot follow the occupation of sailor or longshoreman. *Nelson v. Western Steam Navigation Co.* 177
6. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$9,500 for the loss of a foot by a man sixty-four years of age, engaged in the real estate business and earning \$150 to \$200 per month, is excessive, and should be reduced to \$6,000. *Rangenier v. Seattle Electric Co.* 401

DAMAGES—CONTINUED.

7. **DAMAGES—PERSONAL INJURIES—CAUSE OF INJURY—RESULTING OPERATION—EVIDENCE—SUFFICIENCY.** In an action for personal injuries there is no substantial evidence that a fall upon a defective plank caused a displacement of pelvic organs, requiring an operation, and it is error to submit the issue to the jury, where it appears, that the plaintiff's family physician, called by her, testified emphatically that the condition necessitating an operation was not caused by the fall, but already existed; and there was other medical evidence offered by plaintiff showing that the condition resulted from childbirth prior to the accident, and there was nothing but the plaintiff's own testimony to the contrary, attempting to give the cause of the pain experienced. *Hoyt v. Independent Asphalt Paving Co.*.... 672

DANGER:

Apprehension of imminent danger as defense to homicide, see **HOMICIDE**, 10-12.

DANGEROUS MACHINERY AND APPLIANCES:

See **MASTER AND SERVANT**, 5, 8, 9, 11-13.

DEATH:

Discharge of contract by death of party, see **CONTRACTS**, 3.

Competency of nonexpert as to cause of death of horses, see **EVIDENCE**, 3.

Indemnity insurance against death or accident, see **INDEMNITY**, 1, 4-7.

1. **DEATH—DAMAGES—EXCESSIVE VERDICT.** A verdict for \$15,000 for the death of the foreman of a "bonder gang" on an electric railway, a bright, active man of good habits, 41 years of age, earning \$115 per month, with a wife and two children, is not excessive. *Harris v. Puget Sound Electric R.*..... 289

DEBT:

Imprisonment for debt fraudulently contracted with innkeeper, see **CONSTITUTIONAL LAW**, 2, 3.

Validity of oral promise to pay debt of another, see **FRAUDS, STATUTE OF**, 1.

DEBTOR AND CREDITOR:

See **FRAUDULENT CONVEYANCES**.

DECEIT:

See **FRAUD**.

DECISION:

On appeal, see **APPEAL AND ERROR**, 51.

DECLARATIONS:

As evidence in civil actions, see **EVIDENCE**, 1.

DEDICATION:

1. **DEDICATION—PARKS—RIGHTS OF PURCHASERS—INJUNCTION AGAINST REPLAT OR SALE.** Purchasers of lots in an addition, in which the platators have dedicated land for a park thereby inducing the sales and increasing the value of the lots, may maintain an action to enjoin the recording of a second plat whereby the park is subdivided into lots, and from selling the park or interfering with its use by the public. *Shertzer v. Hillman Investment Co.*..... 492
2. **DEDICATION—PLATS—ESTABLISHMENT OF STREETS—INTENT OF PLATOR—EVIDENCE—SUFFICIENCY.** Where an unknown meander line cut northeasterly across a plat, leaving unplatted triangular parcels between the meander line and the north and west sides of blocks at the outer edge of the plat, dedicated streets extend to the meander line along the sides of the outside blocks, which would otherwise have no street frontage for access, although there are no lines defining the opposite street boundaries; especially where such street extensions were staked out on the ground and not assessed for taxation. *Osborne v. Seattle.*..... 323
3. **DEDICATION—PARKS—ACTS CONSTITUTING—CORPORATIONS—ACTS OF OFFICERS—ESTOPPEL.** The acts of a corporation in platting an addition of suburban property amount to a dedication of part of the land as a park, where a large copy of the plat used in selling lots was exhibited on the walls of its office maintained in the addition, large signs directed investors to the location of the park, it was featured in advertisements in the newspapers, and improved as a park, and the selling agent and the president of the company owning a majority of the capital stock represented it as a park for public use, and the corporation received the benefit of sales made on such representations. *Shertzer v. Hillman Investment Co.*..... 493

DEEDS:

Sufficiency of deed as color of title, see **ADVERSE POSSESSION**, 2, 4.
 Cancellation, see **CANCELLATION OF INSTRUMENTS**.
 Parol or extrinsic evidence contradicting or varying deed, see **EVIDENCE**, 2.
 Alienation of lands by Indians, see **INDIANS**.
 Conveyance of title to vacated alley, see **MUNICIPAL CORPORATIONS**, 8.
 Vacation of deed recorded after suit by operation of judgment, see **QUIETING TITLE**, 4.
 Intended as mortgage, see **QUIETING TITLE**, 3.
 Reformation, see **REFORMATION OF INSTRUMENTS**.
 Tax deeds, see **TAXATION**, 3.

1. **DEEDS—CONSIDERATION—SEAL.** A deed under seal imports a consideration. *Golle v. State Bank of Wilson Creek.*..... 437
2. **DEEDS—MERGER—VENDOR AND PURCHASER—CONTRACT TO SELL—CONSTRUCTION.** There is an exception to the general rule that an accepted deed merges the contract between the parties, where the

DEEDS—CONTINUED.

vendor had agreed in writing "to sell" the land and to convey by a quitclaim deed, and, after payment of the purchase price, it was found that he had no title. *Davis v. Lee*..... 330

DEFAULT:

Liability of indemnitors on default of contractor, see **INDEMNITY**, 2, 3.
Opening or vacating default judgment, see **JUDGMENT**, 2.

DEFENSES:

In action on note, see **BILLS AND NOTES**.
Laches as defense in action to vacate decree for fraud, see **DIVORCE**, 5, 6.
Offset of expense incurred in making purchase in action for fraud of agent in representing price of land, see **FRAUD**, 4.
In action on indemnity bond, see **INDEMNITY**, 4.
In action to foreclose mechanics' lien, see **MECHANICS' LIENS**, 8.
In prosecution for practicing dentistry without license, see **PHYSICIANS AND SURGEONS**, 5.
Pleading inconsistent defenses, see **PLEADING**, 1, 2.
In action on bond guaranteeing building contract, see **PRINCIPAL AND SURETY**.
Pleading defenses in suit to quiet title, see **QUIETING TITLE**, 4.
In action for breach of option contract, see **VENDOR AND PURCHASER**, 16.
In action by vendee for rescission of contract, see **VENDOR AND PURCHASER**, 2, 6, 7.

DELEGATION:

Of power to condemn property for public use, see **EMINENT DOMAIN**.
Of master's duty to servant, see **MASTER AND SERVANT**, 7.

DELIVERY:

Of goods sold, see **SALES**, 2, 3.
Measure of damages for failure to deliver goods, see **SALES**, 6.

DENIALS:

In pleading, see **PLEADING**, 1-3.

DENTISTRY:

What constitutes practicing dentistry, see **PHYSICIANS AND SURGEONS**.

DENTISTS:

See **PHYSICIANS AND SURGEONS**.

DEPARTURE:

In pleading, see **PLEADING**, 1.

DESCENT AND DISTRIBUTION:

Lands patented to married men after enactment of community property law, see **JOINT TENANCY**.

DESCRIPTION:

Definiteness of written grant of right of way, see **EASEMENTS**, 3.
Failure of decree to describe lien notice and amount of land to be sold as ground for reversal, see **MECHANICS' LIENS**, 11, 12.
Of subject-matter in proceedings to perfect mechanics' lien, see **MECHANICS' LIENS**, 5, 12.

DEVISE:

See **WILLS**.

DILIGENCE:

In applying for modification of decree, see **DIVORCE**, 10.
Motion to vacate judgment for fraud or irregularity, see **JUDGMENT**, 5.

DISCHARGE:

Of contract by death of party, see **CONTRACTS**, 3.
Of tax lien by condemnation for strict public use, see **EMINENT DOMAIN**, 1.
Of indemnitors, see **INDEMNITY**, 3, 4.
Of tax lien, see **TAXATION**, 1.

DISCRETION OF COURT:

Review in civil actions, see **APPEAL AND ERROR**, 23.
To grant separate jury trial to ascertain damages for taking land, see **EMINENT DOMAIN**, 9, 10.
Right to administer estate not discretionary with court, see **EXECUTORS AND ADMINISTRATORS**, 2.
In opening default judgment, see **JUDGMENT**, 2.
To allow amendment of pleadings, see **PLEADING**, 5.
Cross-examinations of witness, see **WITNESSES**, 2.

DISMISSAL AND NONSUIT:

Appealability of order of dismissal, see **APPEAL AND ERROR**, 1.
Dismissal on appeal or writ of error, see **APPEAL AND ERROR**, 16.
Review of judgment, correct decision based on wrong ground, see **APPEAL AND ERROR**, 17.
At trial, see **TRIAL**, 7, 9.

DISTRICTS:

Drainage districts, see **DRAINS**.

DITCHES:

See **DRAINS**.

DIVORCE:

Review of rulings as dependent on presentation by record, see APPEAL AND ERROR, 14.

Setoff of rents and profits pending appeal on affirmance of decree, and disallowance of costs, see COSTS.

Annulment of marriage, see MARRIAGE, 4.

1. **DIVORCE—GROUNDS—CRUELTY — WHAT CONSTITUTES — EVIDENCE — SUFFICIENCY.** Personal violence is not necessary to constitute cruel treatment as a ground for divorce, and the evidence is sufficient to warrant a decree where it appears that the husband for seven years refused to speak to his wife or children except when absolutely necessary, made unjust charges of improper conduct, insulted and humiliated her guests, and made himself so disagreeable that the wife's life was rendered miserable and the legitimate ends and objects of matrimony had ceased to exist. *Sullivan v. Sullivan*... 160
2. **SAME—PERSONAL INDIGNITIES—EVIDENCE—SUFFICIENCY.** The statutory ground of "personal indignities rendering life burdensome" authorizes a divorce, although the conduct does not fall within the accepted definition of cruel treatment. *Sullivan v. Sullivan*... 160
3. **DIVORCE—VACATING—CANCELLATION OF SETTLEMENT—DURESS—EVIDENCE—SUFFICIENCY.** The dismissal of an action to set aside a settlement between the parties to a divorce and the deed made by the wife, for alleged fraud and duress by false charges of adultery, is sustained where it appears that she had the property settlement under consideration for some time, knew the character of the property and contents and effect of the deed, which she finally acknowledged, after first protesting she did not do so "freely and voluntarily" and where she acquiesced in the settlement for some two years after being advised as to her rights by an attorney, and there was evidence warranting the husband's belief in the charges which he made, and for which he divorced her. *Tausick v. Tausick*... 301
4. **DIVORCE—VACATING—ATTORNEY AND CLIENT—APPEARANCE—AUTHORITY.** A decree of divorce, entered without service of process and upon defendant's appearance by attorney, will not be set aside for want of authority for the attorney to appear, where the defendant verified the answer and knew of the purpose of the suit and knew of the decree, and shortly after was apprised of her rights, and it appears that she only became dissatisfied later when the husband refused to carry out promises with reference to a settlement. *Tausick v. Tausick*..... 301
5. **DIVORCE—VACATING JUDGMENT—ACTION TO VACATE—PLEADING—DEMURRER TO DEFENSES.** In an action to set aside a divorce for fraud, a demurrer to the defense of laches in prosecuting the suit is properly overruled, although it may have been unnecessary to affirmatively plead it. *Tausick v. Tausick*..... 301

DIVORCE—CONTINUED.

6. **SAME—DEFENSES—LACHES—EVIDENCE.** In an action to set aside a divorce obtained, as claimed, by the duress of threatened false charges of adultery, evidence of such adultery is properly admitted in defense of the action to show that the charges were not false, and that defendant had good grounds for divorce. *Tausick v. Tausick* 301
7. **SAME—ATTORNEY'S FEES—ALLOWANCES—APPEAL—HARMLESS ERROR.** The allowance of an attorney's fee of \$2,500 in a divorce case where \$200,000 worth of property was divided, is not excessive and is without prejudice where the court would doubtless have increased plaintiff's allowance had the attorney's fee not been granted; and although under Bal. Code, § 5165, attorney's fees are to be left to private contract, where the parties have the means to employ them. *Sullivan v. Sullivan*..... 160
8. **SAME—DIVISION OF PROPERTY—SEPARATE AND COMMUNITY PROPERTY.** In granting a divorce and dividing property which the parties have been accumulating for twenty-five years, its origin and the amount of rents and profits of separate estate during that time is immaterial, where a fair division is made. *Sullivan v. Sullivan* 160
9. **SAME.** The right of a divorced party to the custody of children must depend upon present moral conduct and the welfare of the children; not upon past delinquencies. *Pierce v. Pierce*..... 673
10. **DIVORCE—JUDGMENT—MODIFICATION—DILIGENCE IN APPLYING—CUSTODY OF CHILDREN—FITNESS OF PARTIES.** Allegations as to unfitness of the wife to have the custody of children by reason of immoral acts prior to the trial of the divorce case, unknown to the husband at that time, are properly struck from a petition to modify a decree of divorce as to such custody, where the only showing of diligence was the bare allegation that the husband was unable by the exercise of reasonable diligence to procure any evidence of the matter, and he had delayed for two years in applying for modification of the decree. *Pierce v. Pierce*..... 673

DRAINS:

1. **DRAINS—MAINTENANCE—ASSESSMENTS—CONDITIONS PRESENT—ESTIMATES—STATUTES—CONSTRUCTION.** Under Bal. Code, § 3738, an assessment for the maintenance of a drainage district is void where no estimate was made of the cost, as required by the act. *McDougall v. Bridges* 396
2. **SAME—PURPOSE OF ASSESSMENT.** An assessment for the maintenance of a drainage district is void where part of the assessment was stated to be intended for another purpose than that permitted by the statute, and the assessment was in excess of the amount required for any lawful purpose. *McDougall v. Bridges*..... 396

DUE PROCESS OF LAW:

- Requiring diploma from applicants for license to practice dentistry as deprivation of property without due process of law, see CONSTITUTIONAL LAW, 4.
- Provision for assessment and sale of leasehold interest in state lands as deprivation of property without due process, see MUNICIPAL CORPORATIONS, 3-5.
- Act empowering railroad commission to compel trackage connections as taking of property without due process of law, see RAILROADS.

DURESS:

- Evidence of in procuring settlement, see COMPROMISE AND SETTLEMENT, 3.
- In procurement of divorce and settlement of property rights, see DIVORCE, 3-6.
- In execution of will, see WILLS, 1.

EARNINGS:

- Measure of damages for impairment of earning capacity, see DAMAGES, 1.

EASEMENTS:

- See DEDICATION.
- Enjoining obstruction of right of way, see EQUITY, 1.
- Notice of to purchaser in absence of record, see VENDOR AND PURCHASER, 13.

1. **EASEMENTS—GRANT OF RIGHT OF WAY—SECURITY—INTENT.** The intent to grant an easement of a right of way is not disproved by the fact that security was taken to insure the faithful defense and maintenance thereof. *Kalinowski v. Jacobowski*..... 359
2. **SAME—CONTRACT FOR EASEMENT—FORMALITY—CONSTRUCTION.** A written contract whereby the grantor, in consideration of two hundred dollars, covenanted to clear and make a road across his own land and that of another, eight feet wide along the east line of the tract, suitable for the grantee to drive over from the grantee's land to a county road, and "to maintain and defend the said right of way" is the grant of an easement or right of way across his own land, and sufficiently definite and certain; no particular form of words being necessary, and his authority as to the land of a third person being immaterial or presumed. *Kalinowski v. Jacobowski* 359
3. **SAME—DESCRIPTION—DEFINITENESS—USE OF WAY.** The definiteness of a written grant of a right of way is immaterial after the way has been entered upon and used. *Kalinowski v. Jacobowski* 359
4. **SAME—GRANT—ESSENTIALS—VALIDITY IN EQUITY.** A grant of a right of way need not be by deed, but is valid in equity if the consideration has passed between the parties, and the contract has been fully performed. *Kalinowski v. Jacobowski*..... 359

EJECTMENT:

Relief to plaintiff out of possession, see **QUIETING TITLE**, 2.

ELECTION:

To treat mortgage debt as due on default, see **MORTGAGES**.

ELECTION OF REMEDIES:

Action for damages as waiving right to rescission, see **CANCELLATION OF INSTRUMENTS**, 5.

ELECTRICITY:

Condemnation of power for electric power plant, see **EMINENT DOMAIN**, 2, 3.

EMANCIPATION:

Of minor by former action, see **JUDGMENT**, 7.

EMERGENCIES:

Acts of servant in, as contributory negligence, see **MASTER AND SERVANT**, 9.

EMERGENCY CLAUSE:

Effect on amended act, see **STATUTES**, 3.

EMINENT DOMAIN:

Review of verdict on ground of inadequacy of damages, see **APPEAL AND ERROR**, 25.

Harmless error in admission and rejection of evidence, see **APPEAL AND ERROR**, 37, 38.

Opinion evidence, see **EVIDENCE**, 6.

Taking property by state as discharging tax lien, see **TAXATION**, 1.

1. **EMINENT DOMAIN—NATURE—STRICT PUBLIC USE—EFFECT—TAXATION—DISCHARGE OF TAX LIEN.** The power to condemn land for the use of the state being an attribute of sovereignty, recognized, not granted by the constitution, the state may provide for condemnation for a strict, as distinguished from a quasi public use, that will discharge the land from liens for unpaid taxes. *Gasaway v. Seattle* 444
2. **EMINENT DOMAIN—PUBLIC USE—ELECTRICAL POWER PLANT—SALE OF POWER FOR PUBLIC PURPOSES.** The condemnation of a water power for the purpose of generating electricity to be sold to third persons and corporations for municipal and public lighting and for the operation of common carrying railroads is for a public use. *State ex rel. Dominick v. Superior Court*..... 196
3. **SAME—PERSONS ENTITLED—ELECTRIC POWER—USE OF SURPLUS.** The fact that a corporation seeking to exercise the power of eminent domain to generate electric power for public use had complied with the law of 1907, p. 349, which seeks to authorize the use of surplus power for private purposes, does not affect its right to condemnation

EMINENT DOMAIN—CONTINUED.

- for the public purposes sought, whether the law of 1907 is constitutional or not; since the question as to the proper use of the surplus power does not affect the right to condemn for public uses. *State ex rel. Dominick v. Superior Court*..... 196
4. EMINENT DOMAIN—PROCEEDINGS—NECESSARY PARTIES. A proceeding to condemn property is *in rem*, and the only necessary parties are those named by the statute. *Gasaway v. Seattle*..... 444
 5. SAME—"PERSONS INTERESTED"—COUNTY HOLDING TAX LIEN—STATUTES—CONSTRUCTION. Under Laws 1903, p. 189, providing that a condemnation by a city of the first class shall proceed against the owners and occupants of the land and "persons having an interest therein so far as known to the officer filing the petition or appearing from the records in the office of the county auditor," a county having a lien for taxes assessed and unpaid is not a necessary party defendant, since the city is not obliged to go beyond the knowledge of its officer and the county auditor's records, and the county is not a "person interested" within the meaning of the act. *Gasaway v. Seattle* 444
 6. EMINENT DOMAIN—PROCEEDINGS—PROCESS—WAIVER OF OBJECTIONS TO SERVICE. In eminent domain proceedings by a city, objection to the sufficiency of the service of process upon the owner will not be considered after the assignee of the owner has accepted and received the award of compensation for the land taken. *Gasaway v. Seattle* 444
 7. EMINENT DOMAIN—PLEADINGS—ABUTTING OWNERS—CROSS-COMPLAINT. The act, Laws of 1905, p. 84, does not require, in proceedings to condemn property for a regrade of city streets, any answer from the original parties to the suit, and a cross-complaint filed by such a party is properly struck out. *Manhattan Building Co. v. Seattle* 226
 8. EMINENT DOMAIN—DAMAGES—CHANGE OF GRADE—EVIDENCE—PLANS—ADMISSIBILITY. Upon an issue as to the cost of readjusting buildings to conform to a change of grade, a sketch of plans of a proposed change is not inadmissible because not made with reference to the latest building ordinances of the city, where it does not appear that anything new is required thereby. *Manhattan Building Co. v. Seattle*..... 226
 9. SAME—TRIAL—JURY TRIAL—REVIEW—DISCRETION. Laws 1905, p. 87, § 7, providing for separate juries to determine the damages in condemnation proceedings by a city for street purposes, if demanded, "and the court shall deem it proper," leaves it discretionary to grant separate trials, and the action of the court will be reviewed only for an abuse of discretion. *Manhattan Building Co. v. Seattle*..... 226
 10. SAME—ABUSE OF DISCRETION. It is not an abuse of discretion to refuse a demand for a separate jury in such a case, asked on the ground that the jurors had, after numerous other trials, formed an

EMINENT DOMAIN—CONTINUED.

- opinion which it would take evidence to remove, where prejudice does not appear from the verdict returned, and the trial court had abundant opportunity to test the fairness of the jury. *Manhattan Building Co. v. Seattle*..... 226
11. **SAME—JURY—CHALLENGE—JOINING IN CHALLENGE.** Under Bal. Code, § 4979, providing that defendants representing different interests shall join in their peremptory challenges to jurors, an abutting owner having a separate trial in condemnation proceedings is not entitled to exercise separate challenges. *Manhattan Building Co. v. Seattle*..... 226
12. **SAME—EXAMINATION OF JURY.** Where a jury in condemnation proceedings is empanelled to try the whole issue of compensation to different defendants, an abutter, upon entering upon a separate trial, is not entitled to again examine a juror as to his qualifications by reason of matters occurring since the jury was empanelled, even where the party offered to show that the juror had formed opinions which it would take evidence to remove, there being no offer to show disqualifications by extrinsic evidence. *Manhattan Building Co. v. Seattle*..... 226
13. **EMINENT DOMAIN—PROCEEDINGS—COSTS—IMMUNITY OF LAND-OWNER—COSTS ON APPEAL.** Const. art. 1, § 16, providing that private property shall not be taken or damaged without just compensation having been first made or paid into court, prevents the taxation of costs in condemnation proceedings against the landowner only in the lower court, and does not exempt him from the costs of his appeal to the supreme court, when, under Bal. Code, § 5643, he fails to recover a greater amount of damages on the appeal. *Kittas County v. Melker*..... 49

EMPLOYEES:

See **MASTER AND SERVANT.**

ENTRY:

By claimant in good faith, see **ADVERSE POSSESSION.**

Effect of failure to enter order of probate of record, see **EXECUTORS AND ADMINISTRATORS, 7.**

Of judgment, see **JUDGMENT, 3.**

EQUITY:

See **CANCELLATION OF INSTRUMENTS; SPECIFIC PERFORMANCE.**

Necessity of findings in equity case, see **APPEAL AND ERROR, 12; TRIAL 17.**

Review of findings in equity, see **APPEAL AND ERROR, 29, 30.**

Suit by stockholders against corporation, see **CORPORATIONS, 1.**

Essentials to grant of right of way, see **EASEMENTS, 4.**

Equitable estoppel, see **ESTOPPEL.**

Determination of adverse claims to real property, see **QUITTING TITLE.**

EQUITY—CONTINUED.

1. **EQUITY—INJUNCTION—OBSTRUCTION OF EASEMENT—REMEDY AT LAW.** Equity will restrain the obstruction of a right of way by fences, as the remedy at law is inadequate. *Kalinowski v. Jacobowski* 359
2. **EQUITY—LACHES—RECOVERY OF REAL ESTATE—LIMITATION OF ACTIONS.** Laches will not bar a recovery of lands by Indians held under void deeds, within the statutory limitation for the commencement of the action. *Starr v. Long Jim*..... 138

ESCAPE:

Liability on official bond for escape of prisoners, see **SHERIFFS AND CONSTABLES**.

ESTATES:

Estates of deceased persons, see **EXECUTORS AND ADMINISTRATORS**.

Joint tenancy, see **JOINT TENANCY**.

Tenancy in common, see **TENANCY IN COMMON**.

ESTOPPEL:

To allege error in civil actions or proceedings, see **APPEAL AND ERROR**, 20.

Right to raise question for first time on appeal, see **APPEAL AND ERROR**, 3-8.

Of corporation to deny dedication of park, see **CORPORATIONS**, 3.

Recital in bill of sale of assets as estoppel against claims for wages due stockholders, see **CORPORATIONS**, 7.

Of husband to deny wife's authority to surrender contract for purchase of community property, see **HUSBAND AND WIFE**, 2.

To avoid insurance policy, see **INSURANCE**, 2.

By judgment, see **JUDGMENT**, 7.

Of vendee to deny title of vendor, see **VENDOR AND PURCHASER**, 12.

1. **ESTOPPEL—ADVERSE POSSESSION—ACCEPTING REPAYMENT OF TAX.** One claiming title to land by adverse possession, who by mistake paid a tax on adjoining land of the adverse claimant, is not estopped from asserting claim to the land in his possession by accepting repayment of the tax on the adjoining land. *Schlossmacher v. Beacon Place Co.* 588
2. **ESTOPPEL—EQUITY—LACHES—QUIETING TITLE.** The claim of laches in bringing an action to quiet title cannot be made by a co-owner who knew that the plaintiffs were in ignorance of the title and interest of their ancestors, and who never took any possession of the land or gave any notice of his claim thereto. *Stone v. Marshall* 375

EVIDENCE:

Review of rulings as dependent on presentation of objection in lower court, see **APPEAL AND ERROR**, 4, 5.

Review of rulings as dependent on presentation by record, see **APPEAL AND ERROR**, 13, 14.

Scope of review of sufficiency of evidence, see **APPEAL AND ERROR**, 24-26.

Presumptions as to evidence not brought up in record, see **APPEAL AND ERROR**, 29.

Review of ruling as dependent on prejudicial nature of error, see **APPEAL AND ERROR**, 36-46.

In action on county official's bond, see **BONDS**.

Of agency in employment of broker to effect sale, see **BROKERS**, 1.

In suit for cancellation of instruments, see **CANCELLATION OF INSTRUMENTS**, 3, 4.

In action for injuries to passenger, see **CARRIERS**, 17-22.

Of damages from delay in shipping live stock, see **CARRIERS**, 7.

Of compromise, see **COMPROMISE AND SETTLEMENT**.

Of duress in procuring settlement, see **COMPROMISE AND SETTLEMENT**, 3.

Of fraud in mutual rescission of contract of purchase, see **COMPROMISE AND SETTLEMENT**, 4.

To explain ambiguity in contract, see **CONTRACTS**, 1.

Of contract to pay wages to officers of corporation, see **CORPORATIONS**, 2, 3.

In criminal prosecutions, see **CRIMINAL LAW**, 1-4, 13, 14; **HOMICIDE**, 2-7; **RAPE**.

Of cause of injury, see **DAMAGES**, 7.

Of intent of platlor in dedicating street, see **DEDICATION**, 2.

In divorce proceedings, see **DIVORCE**, 1-3, 6.

Condemnation proceedings, see **EMINENT DOMAIN**, 8.

In action for fraud, see **FRAUD**, 7-10, 12.

To establish gift, see **GIFTS**.

In prosecution for homicide, see **HOMICIDE**, 2-7.

Separate property of married woman, see **HUSBAND AND WIFE**, 1.

Of responsibility of contractors for defect in street, see **INDEMNITY**, 7.

In action on policy of marine insurance, see **INSURANCE**.

Clerk's minutes as conclusive evidence of actual judgment, see **JUDGMENT**, 3.

For injuries to servant in general, see **MASTER AND SERVANT**.

Employment of incompetent coservant, see **MASTER AND SERVANT**, 6, 10, 14, 15.

To enforce mechanics' lien, see **MECHANICS' LIENS**, 7, 8.

Showing grounds for new trial, see **NEW TRIAL**.

In prosecution for practicing dentistry without license, see **PHYSICIANS AND SURGEONS**.

Review of orders in superior court upon evidence taken before railroad commission, see **RAILROADS**, 2, 9.

EVIDENCE—CONTINUED.

In suit to reform written instrument, see REFORMATION OF INSTRUMENTS.

In action by buyer for breach of contract of sale, see SALES, 4, 6.

To aid construction of statute, see STATUTES, 1.

Comment on by judge at trial, see TRIAL, 10.

Questions of fact for jury, see TRIAL, 7, 8.

Reception at trial, see TRIAL.

Of payment of consideration for option, see VENDOR AND PURCHASER, 11.

Of mutual rescission of contract for purchase of land, see VENDOR AND PURCHASER, 5.

Of duress and undue influence in inducing execution of will, see WILLS, 1.

Competency, attendance, credibility and examination of witnesses, see WITNESSES.

1. **EVIDENCE—ADMISSION—DECLARATIONS AGAINST INTEREST—BROKERS—CONTRACTS.** In an action to recover a broker's commission, defended on the ground of fraud by falsely reading to defendant a contract prepared for his signature by the plaintiff, cross-examination of a third party, who was interested in the commissions, as to a conversation between witness and the defendant fixing the terms of the proposed sale, is admissible as a declaration against interest upon the issue of fraud in the terms of the contract as read over to the defendant. *Kinnane v. Conroy*..... 651
2. **EVIDENCE—PAROL VARYING WRITING—DEED AND OPTION GIVEN AS MORTGAGE.** Where a deed was given as security for a debt, the grantee giving back to the grantor an "option to purchase," oral evidence showing that the intent of the parties was to consider the two instruments as a mortgage is not inadmissible as varying the terms of the written option. *Clambey v. Copland*..... 580
3. **EVIDENCE—OPINIONS—NONEXPERT EVIDENCE AS TO CAUSE OF DEATH OF HORSES.** One who is possessed of only common knowledge on the question is incompetent to give his opinion as to the cause of the sickness and death of horses carried in violation of the Federal statute requiring unloading for rest, food, and water. *Pierson v. Northern Pac. R. Co.* 595
4. **EVIDENCE—HANDWRITING—IDENTIFICATION.** A witness who has seen a party write and knows his handwriting is competent to identify letters written by him. *State v. Simmons*..... 132
5. **EVIDENCE—OPINIONS OF EXPERTS—QUESTION FOR JURY.** The opinion of experts is inadmissible to show that the method of loading logs on a sled was not proper and safe, that being an issue for the jury to determine from full details as to how the logs were loaded and the usual manner of loading in that and other camps in the same locality. *Hogg v. Standard Lumber Co.*..... 8

EVIDENCE—CONTINUED.

6. **EVIDENCE—EXPERTS—QUALIFICATION.** In condemnation proceedings of a leasehold interest for a regrade of streets, a witness is qualified as an expert where he says he is familiar with the effect of the improvement on rental values, although he at first stated he was not familiar with its effect on the market value of leasehold interests. *Manhattan Building Co. v. Seattle*..... 226
7. **EVIDENCE—HANDWRITING—INSTRUCTIONS.** It is proper to refuse to instruct that a jury may not resort to a comparison of any writing not admitted by the defendant to be genuine, with any other writings not admitted by him, for the purpose of determining the genuineness of any or either of such writings. *State v. Simmons*.... 132

EXAMINATION:

Of juror in condemnation proceedings, see **EMINENT DOMAIN**, 12.
 Of jurors for challenge for cause, see **JURY**.
 Of witnesses in general, see **WITNESSES**.

EXCEPTIONS:

Necessity for exceptions for purpose of review, see **APPEAL AND ERROR**, 4-7.

EXCEPTIONS, BILL OF:

Presentation and reservation of grounds of review in record, see **APPEAL AND ERROR**, 11, 15.

EXCESSIVE DAMAGES:

See **DAMAGES**, 3-6.
 For negligence in causing death, see **DEATH**.

EXECUTION:

1. **EXECUTION SALES—SETTING ASIDE—GROUNDS—IRREGULARITY—INADEQUACY OF BID.** The fact that a higher bid is submitted after sale of lands on execution is not ground for refusing to confirm the sale, under Laws 1899, p. 88, § 6, subd. 2, requiring a confirmation unless there appear "substantial irregularities in the proceedings concerning the sale, to the probable loss or injury of the party objecting." *Merritt v. Graves* 57
2. **SAME—NOTICE OF SALE TO DEFENDANT.** Parties to an action are not entitled to personal notice of the time and place of an execution sale, under Laws 1899, p. 86, § 3. *Merritt v. Graves*..... 57
3. **SAME—PARTIES ENTITLED TO PURCHASE—ATTORNEY FOR PLAINTIFF.** The attorney of the execution plaintiff may become the purchaser of lands at execution sale, the plaintiff not objecting, and the execution debtor cannot object to confirmation of the sale on that ground. *Merritt v. Graves*..... 57

EXECUTORS AND ADMINISTRATORS:

1. **EXECUTORS AND ADMINISTRATORS—NONRESIDENT DECEDENTS—NECESSITY OF ADMINISTRATION.** Upon the death of a nonresident, leaving real property in this state, there is the same necessity for administration in this state as in the case of resident decedents, regardless of proceedings in another state, as they are of no effect in this state for any purpose. *State ex rel. Mann v. Superior Court* 149
2. **SAME—RIGHT TO ADMINISTER—DISCRETION.** The right to administer upon an estate is statutory, with no discretion in the court where proper application is made. *State ex rel. Mann v. Superior Court* 149
3. **EXECUTORS AND ADMINISTRATORS—HUSBAND AND WIFE—COMMUNITY PROPERTY—ADMINISTRATION—JURISDICTION TO ADMINISTER ONE-HALF—COLLATERAL ATTACK.** Upon the death of a wife, the court has jurisdiction to administer upon her undivided one-half interest in community real property, no objection being made, although the proceeding may be irregular and the proper course would have been to administer upon the entire community estate; and a sale of such half interest to pay community debts cannot be collaterally attacked for want of jurisdiction. *Wiley v. Verhaest*..... 475
4. **SAME—PROBATE OF FOREIGN WILL—DEBTS.** Upon the probate of a foreign will, the absence of debts can only be established by notice to creditors. *State ex rel. Mann v. Superior Court*..... 149
5. **EXECUTORS AND ADMINISTRATORS—ACTIONS—SET-OFF AND COUNTERCLAIM.** Where as part consideration for a note, the payee agreed to work for the maker for six months as a dentist, giving defendant one-half of his earnings, and died before completing the contract, in an action by his executors on the note, the maker may offset his damage for failure of the decedent to perform the contract, if the same was more favorable to defendant than any contract he could have made with any other person equally skilled; and the measure of such damage is the difference between the contract made and a contract for service with one equally skilled. *Mendenhall v. Davis* 169
6. **SAME—SET-OFF AND COUNTERCLAIM—PRESENTATION OF CLAIM.** In an action brought by an executor or administrator, a demand against the estate may be offset to the extent of plaintiff's recovery, without previous presentation of a claim therefor, as required by Bal. Code, § 6226, under Pierce's Code, § 1093, providing for a set-off in such cases "in the same manner as if the action had been brought by and in the name of the deceased." *Mendenhall v. Davis*..... 169
7. **EXECUTORS AND ADMINISTRATORS—WILLS—PROBATE—ORDER—ENTRY—INADVERTENCE.** Inadvertence in failing to enter an order of probate of record is not a valid objection to administration based on the probate of the will. *State ex rel. Mann v. Superior Court*.. 149

EXEMPTIONS:

From taxation, see **TAXATION**, 1.

EXHIBITS:

Taking to jury room, see **CRIMINAL LAW**, 11.

EXPERTS:

Cross-examination of in action on official bond, see **BONDS**, 2.

EXPERT TESTIMONY:

In civil actions, see **EVIDENCE**, 3-7.

EXTRINSIC AID:

To statutory construction, see **STATUTES**, 1.

FALSE REPRESENTATIONS:

See **FRAUD**.

Liability of bank for representations of officer, see **BANKS AND BANKING**, 1.

FELLOW SERVANTS:

See **MASTER AND SERVANT**, 6, 7, 10, 14, 15.

FILING:

Certificate of firm name by partnership, see **PARTNERSHIP**.

FINDINGS:

Review as dependent on presentation of objection below, see **APPEAL AND ERROR**, 8.

Necessity for including in transcript, see **APPEAL AND ERROR**, 12.

Review on appeal or writ of error, see **APPEAL AND ERROR**, 27-34.

Necessity to support decree in equity case, see **TRIAL**, 17.

FIRES:

Police regulations for prevention of and protection against fires, see **MUNICIPAL CORPORATIONS**, 6, 7.

1. **FIRES—ACTION FOR LOSS—COMPLAINT—ALLEGING TITLE TO PROPERTY DESTROYED—LOGS—CONTRACT FOR CUTTING.** In an action for the value of poles cut by the plaintiff upon defendant's land, under a contract whereby plaintiff was to cut, yard, and measure the poles and pay defendant therefor, lost by a fire negligently set out by defendant, the plaintiff need not allege that his title to the poles had vested by the completion of his work and payment therefor; since he was not working for wages and had a certain value invested in the poles. *Aune v. Austin-Williams Timber Co.*..... 356

FORECLOSURE:

Of mechanics' lien, see **MECHANICS' LIENS**.

Of mortgage, see **MORTGAGES**.

FOREIGN ADMINISTRATION:

See **EXECUTORS AND ADMINISTRATORS**, 4.

FORGERY:

Effect of forgery in securing marriage license for minor, see **MARRIAGE**, 1.

FORMER ADJUDICATION:

See **JUDGMENT**, 7.

FRAUD:

Liability of bank for false representations of officer, see **BANKS AND BANKING**, 1.

As ground for cancellation of instruments, see **CANCELLATION OF INSTRUMENTS**, 4, 5.

In procuring settlement under rescinded contract, see **COMPROMISE AND SETTLEMENT**, 4.

Validity of act prescribing imprisonment for fraudulent contraction of innkeeper's bill, see **CONSTITUTIONAL LAW**, 1-3.

Conveyances in fraud of creditors, see **FRAUDULENT CONVEYANCES**.

As ground for opening or vacating judgment, see **JUDGMENT**, 5.

Effect on limitation, see **LIMITATION OF ACTIONS**, 1.

In securing marriage license for minor, see **MARRIAGE**.

Of agent in execution of powers, see **PRINCIPAL AND AGENT**, 1.

Payment before commencement of work as fraud vitiating indemnity bond, see **PRINCIPAL AND SURETY**, 2.

Of vendor avoiding contract of sale of land, see **VENDOR AND PURCHASER**, 1, 2.

1. **FRAUD—RELIANCE ON REPRESENTATIONS—VENDOR AND PURCHASER.** The purchaser of property, unacquainted with values in the locality, may, without making an investigation, rely on the statements of one who undertook to make the purchase for her, and misrepresented the purchase price paid. *Jameson v. Kempton*..... 106
2. **SAME—OPINIONS.** A false representation as to the solvency of a corporation is not necessarily matter of opinion, and is actionable where the defendant was familiar with its affairs down to the smallest detail. *Simons v. Cissna*..... 115
3. **SAME—RELIANCE ON REPRESENTATIONS—DUTY TO INVESTIGATE.** One is not negligent in failing to investigate representations as to the solvency of a corporation, if they were made under circumstances to justify belief by a reasonably prudent man. *Simons v. Cissna*.. 115
4. **FRAUD—OF AGENT TO PURCHASE LAND—DEFENSES—SET-OFF.** In an action for deceit in misrepresenting the price of land purchased for the plaintiff, defendant cannot offset expenses incurred in making the purchase as agent for the plaintiff, especially where he took no chances and voluntarily paid out the expense to one associated in business with him. *Jameson v. Kempton*..... 106
5. **FRAUD—OF AGENT TO PURCHASE LAND—PLEADING—COMPLAINT—SUFFICIENCY.** In an action the gist of which was to recover for the deceit of an agent to purchase land for plaintiff in misrepresenting the price he paid for it, the complaint is good, as against a demurrer,

FRAUD—CONTINUED.

- without alleging specifically the fact of the agency, its character, terms, scope, etc., or the fact that the property was of less value than the fraudulently represented price, where it appears that the defendant voluntarily undertook to serve the plaintiff and fraudulently concealed and misrepresented the true price paid. *Jameson v. Kempton* 106
6. FRAUD—DECEIT AS TO CREDIT—COMPLAINT—SUFFICIENCY. A complaint for deceit as to the solvency of a corporation is sufficient where it alleges false representations relating to existing material facts, defendants' knowledge of their falsity and intent to deceive, and plaintiff's ignorance and reliance thereon to his damage. *Simons v. Cissna* 115
7. SAME—EVIDENCE—ADMISSIBILITY. In an action for the deceit of an agent to purchase land, in misrepresenting the price paid, the evidence of the value of the land to show that a good bargain was made is inadmissible in defense of the fraud. *Jameson v. Kempton* 106
8. FRAUD—DECEIT AS TO CREDIT—TEST OF SOLVENCY. False representations that a corporation was wholly solvent and would pay one hundred cents on the dollar, inducing plaintiff to enter into a logging contract of considerable magnitude, go far beyond the test of solvency prescribed by the National Bankruptcy Act; and the proper test of solvency is that it be of the character which permits the discharge of its debts as they fall due in the ordinary course of business. *Simons v. Cissna*..... 115
9. SAME—SUBSEQUENT TRANSACTIONS. In an action for deceit as to the credit of a corporation at a certain time, what transpired thereafter affecting the question of solvency is material only as it tends to show the extent of the damage. *Simons v. Cissna*..... 115
10. SAME—SOLVENCY—EVIDENCE—SUFFICIENCY. There is sufficient evidence to sustain a verdict for false representations as to the credit of a corporation, where it was represented to be solvent, good for one hundred cents on the dollar, and owning a mill and timber lands with \$20,000 back of it, where in fact but \$5,000 of its capital was paid in, and had been used as a first payment on a contract to purchase its mill and timber lands for \$18,000, subject to forfeiture if \$500 was not paid each month, its stockholders were insolvent, and it had no other assets. *Simons v. Cissna*..... 115
11. FRAUD—DECEIT AS TO CREDIT—MEASURE OF DAMAGES—INSTRUCTIONS. In an action for damages for false representations as to the solvency of a corporation, whereby plaintiff agreed to log its lands for from \$4.00 to \$4.50 a thousand, and incurred expense in building skid roads, moving donkey engines, and delivering logs, which was lost by the insolvency of the corporation, instructions on the measure of damages allowing recovery for the sum plaintiff had earned

FRAUD—CONTINUED.

under the contract and for the expense incident to the work are erroneous, as they give double damages, regardless of whether profits could be recovered at all. *Simons v. Cissna*..... 115

12. **SAME—INSTRUCTIONS.** In an action for deceit as to the credit of a corporation at a certain time, insolvency at a subsequent time is immaterial where the insolvency at the time in question was fully shown; and instructions thereon should not be given. *Simons v. Cissna* 115

FRAUDS, STATUTE OF:

1. **FRAUDS, STATUTE OF—PROMISE TO PAY DEBT OF ANOTHER—CHATTEL MORTGAGES—ASSUMPTION OF DEBT BY PURCHASER.** A promise by the purchaser of mortgaged chattels to pay the mortgage debt if the mortgagee would consent to the transfer, makes the debt the debt of the purchaser, and is not within the statute of frauds, and need not be in writing. *Gay v. Schaefer*..... 269
2. **FRAUDS, STATUTE OF—SALE OF GOODS—MEMORANDUM—SIGNATURE OF BROKER.** A broker's signed contract to buy coffee showing the names of the seller and buyer, date, quality, amount, price and terms of sale, entered in his sale book, constitute a sufficient memorandum of the sale to satisfy the requirements of the statute of frauds. *Ankeny v. Young Bros*..... 235

FRAUDULENT CONVEYANCES:

Gift to wife as conveyance in fraud of creditors, see **HUSBAND AND WIFE, 1.**

1. **FRAUDULENT CONVEYANCES — TRANSFER FOR FUTURE SERVICES OF ATTORNEY—ATTACHMENTS—PRIORITY OVER BILL OF SALE.** Persons in the rightful possession of property, charged with the larceny thereof, may transfer the same to attorneys for services rendered and to be rendered in the defense of their persons and the property, to the extent of a reasonable fee, as against objection by prior creditors, and the same will not be held fraudulent as to such creditors subsequently levying attachments on the property, where the only question involved was as to the priority of the attachments over the bill of sale to the attorneys. *Zent v. Gilson*..... 319
2. **FRAUDULENT CONVEYANCES — PREFERENCES.** A debtor in failing circumstances can prefer a creditor by mortgaging all his property to the exclusion of other creditors. *Zent v. Gilson*..... 319

FREIGHT:

Change and regulation of freight rates by railroad commission, see **CARRIERS, 2.**

GIFTS:

Gifts to wife as separate property, see **HUSBAND AND WIFE**, 1.

1. **GIFTS—EVIDENCE OF INTENT—SUFFICIENCY.** Furnishing money to buy lots and build a house, by three children, is sufficiently shown to have been with intent to make a gift thereof to their mother, to whom deed was made, where she and her daughter so testify, as against the testimony of one son to the contrary. *Garvey v. Garvey* 516

GRAND JURY:

Instructions to as matters reviewable at instance of prosecuting attorney, see **CERTIORARI**, 1, 2.

GRANTS:

Essentials to grant of right of way, see **EASEMENTS**, 4.

GUARDIAN AND WARD:

Former action by guardian as emancipation of minor, see **JUDGMENT**, 7.

HABEAS CORPUS:

1. **HABEAS CORPUS — WARRANT — SUFFICIENCY — REMEDY BY APPEAL.** The sufficiency of a warrant will not be inquired into upon an application for a writ of habeas corpus to release a prisoner held thereunder, the remedy being by appeal. *In re Milecke*..... 312

HANDWRITING:

Comparison, see **EVIDENCE**, 7.

Opinion evidence, see **EVIDENCE**, 4, 7.

HARMLESS ERROR:

In civil actions, see **APPEAL AND ERROR**, 35-50.

In criminal prosecutions, see **CRIMINAL LAW**, 12-14.

HEARSAY:

In criminal prosecutions, see **CRIMINAL LAW**, 2.

Affidavits on motion for new trial as hearsay evidence, see **NEW TRIAL**.

HIGHWAYS:

Defects or obstructions in city streets, see **MUNICIPAL CORPORATIONS**, 9, 10.

Collisions between street cars and vehicles, see **STREET RAILROADS**.

HOMICIDE:

1. **HOMICIDE—SELF DEFENSE.** A simple assault or an ordinary battery do not justify the taking of life in self defense. *State v. Churchill* 210

HOMICIDE—CONTINUED.

2. **HOMICIDE—SELF DEFENSE—EVIDENCE—FIGHT WITH DECEASED.**
Upon a plea of self defense, evidence of a fight between deceased and the accused, two hours before the homicide, is admissible as a circumstance from which malice might be inferred. *State v. Churchill* 210
3. **HOMICIDE—EVIDENCE.** An assignment of error in excluding evidence of the details of a fight between the deceased and accused is without merit where the details were not presented by the state, the conversation sought to be brought out was not part of the *res gestae*, and the accused was permitted to go into the details of the fight. *State v. Churchill*..... 210
4. **SAME—DISPOSITION OF DECEASED.** It is not error to exclude evidence of fights and quarrels which the deceased had had with others, where it does not appear that the accused was informed thereof and the evidence does not go to the point as to who was the aggressor. *State v. Churchill*..... 210
5. **SAME—REPUTATION OF DECEASED.** Upon an issue of self defense it is not error to exclude evidence of the reputation of deceased as to "using unfair means in fights," as calling for the conclusion of the witness; especially where the witness testified to his reputation as a "gun fighter." *State v. Churchill*..... 210
6. **SAME—SELF DEFENSE—EVIDENCE.** Where the accused claimed that the killing was in self defense and that deceased advanced with his hand behind his back as if in the act of drawing a weapon, it is admissible for the wife of the deceased to testify that her husband never owned a revolver, as a circumstance tending to show that the accused was not in actual danger, and that the deceased was not armed, to offset cross-examination seeking to establish that a weapon had subsequently been taken from deceased. *State v. Churchill* 210
7. **SAME—CLOTHING OF DECEASED.** Upon the plea of self defense the clothing of the deceased worn at the time of the shooting is admissible upon an issue as to whether the deceased was in a striking attitude when shot. *State v. Churchill*..... 210
8. **HOMICIDE—SELF DEFENSE—INSTRUCTIONS.** Where the only evidence as to deceased's carrying a gun was a statement on cross-examination that none was found on his body and evidence of his wife that he never owned any, it is not error to refuse to instruct that such evidence was to be considered only to determine whether he was a dangerous man; since it also bore upon the question whether accused was in actual danger. *State v. Churchill*..... 210
9. **SAME—APPEARANCE OF DANGER.** Instructions on the right of self defense are correct where they authorize the accused when attacked to act upon reasonable appearances of danger, judged from the accused's standpoint. *State v. Churchill*..... 210

HOMICIDE—CONTINUED.

10. **SAME.** The criterion of apparent danger is the situation as viewed from defendant's standpoint, or danger apparent to his comprehension as a reasonable man in his situation. *State v. Churchill*... 210
11. **SAME—BELIEF IN DANGER.** An instruction as to the right of the accused to act in self defense if in the "honest belief" of danger, is equivalent to requiring a "reasonable belief," and both may be used conjunctively. *State v. Churchill*..... 210
12. **SAME—BODILY HARM.** An instruction on self defense properly requires apparent danger of "great" bodily harm. *State v. Churchill* 210

HUSBAND AND WIFE:

Division of separate and community property, see **DIVORCE**, 8.

Divorce and judicial separation, see **DIVORCE**.

Administration of deceased wife's half of community property, see **EXECUTORS AND ADMINISTRATORS**, 3.

Character of estate in lands patented to married men after enactment of community law, see **JOINT TENANCY**.

Marriage and annulment thereof, see **MARRIAGE**.

1. **HUSBAND AND WIFE—COMMUNITY PROPERTY—GIFTS—FRAUDULENT CONVEYANCES—EVIDENCE—SUFFICIENCY.** It sufficiently appears, within the rule casting the burden of proof upon the wife in case of a gift from the husband, that real property standing in the name of the wife was her separate property, where there was nothing to impeach the testimony of the parties that the money with which it was purchased was secured by the husband for personal injuries sustained, and given by him to his wife, and the deed taken in her name, upon legal advice, in order to effect a gift thereof to her, in the absence of creditors of the husband at the time the gift was made, although the husband paid taxes for two years and some interest, and the wife's deed was not at once recorded. *Corbett v. Sloan* 1
2. **HUSBAND AND WIFE—COMMUNITY PROPERTY—CONTRACTS BY WIFE—AUTHORITY.** A husband cannot object to his wife's want of authority to surrender a contract for the purchase of community property which he permitted her to enter into. *Bowers v. Good*..... 384
3. **HUSBAND AND WIFE—INFANTS—RIGHT OF HUSBAND TO SOCIETY OF WIFE—ACTION FOR CUSTODY—PARTIES.** A minor husband becomes of full age upon the performance of the ceremony, and may maintain an action in his own name to secure the custody and society of his wife. *In re Hollopeter*..... 41

IMPLIED REVOCATION:

Of will by subsequent marriage, see **WILLS**, 2.

IMPLIED WARRANTY:

Of title in contract to convey, see **VENDOR AND PURCHASER**, 10.

IMPORTS:

Duties, see CUSTOMS DUTIES.

IMPRISONMENT:

See HABEAS CORPUS.

For debt fraudulently contracted with innkeeper, see CONSTITUTIONAL LAW, 2, 3.

IMPROVEMENTS:

Public improvements, see MUNICIPAL CORPORATIONS, 3-8.

IMPUTED NEGLIGENCE:

See CARRIERS, 23, 24.

INADEQUATE PRICE:

As ground for vacating execution sale, see EXECUTION, 1.

INCOMPETENCY:

Of servants, see MASTER AND SERVANT, 6, 10, 14, 15.

INCONSISTENT DEFENSES:

See PLEADING, 1, 2.

INDEMNITY:

Contracts of suretyship, see PRINCIPAL AND SURETY.

Allowance of interest after tender of amount due on indemnity contract, see TENDER.

1. INDEMNITY—INSURANCE—POLICY—LIMIT OF LIABILITY—COSTS OF SUIT—WHAT INCLUDED—INTEREST—CONTRACT—CONSTRUCTION. Under a policy of accident indemnity insurance which limited the liability of the company for a death loss, on the assured's premises or adjacent sidewalks, to the sum of \$5,000, and stipulated that the company would defend any suit against the assured "at its own cost," the company is only liable for \$5,000 of a judgment obtained by a city against the assured, after a recovery against the city for the death of a person on the adjacent sidewalk, together with interest and all costs incurred by the assured in defending the suit brought by the city; and it is error to include costs incurred by the city on the defense of the original action against the city, with accumulated interest. *Puget Sound Imp. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co.* 124
2. INDEMNITY—BONDS—BUILDING CONTRACTS—DEFAULT OF CONTRACTOR—COMPLETION OF BUILDING BY OWNER—LIABILITY. Indemnitors, who give a bond to a surety company to indemnify it against loss upon a contractor's bond guaranteeing the construction of a building contract, are liable over to the surety company for the amount it was compelled by judgment to pay on default of the contractor, where the owner, under the terms of the building contract, took possession and completed the building, putting another in

INDEMNITY—CONTINUED.

charge of the construction without withholding the contract price until completion, although the indemnitors were not parties to agreements made with the surety company consenting to that arrangement; since the contract gave the owner the right to so do without such consent, the two bonds, the contract, and the plans and specifications definitely referring to each other and being all one transaction, and authorizing all that the owner did to complete the building himself. *Title Guaranty & Trust Co. v. Murphy*.... 190

3. SAME. In such a case, the indemnitors are not discharged because the building, which was to be a "brick veneer," was referred to in the indemnitor's bond as a "two-story frame dwelling," it being the same building described in the contract, and properly described either way. *Title Guaranty & Trust Co. v. Murphy*..... 190
4. SAME—DEFENSES—DISCHARGE OF INDEMNITORS—DILATORY OBJECTIONS—EFFECT OF WAIVER. The fact that an action against a city for damages was prematurely commenced, after rejection of the claim (the charter provisions requiring a delay of sixty days) and waiver of the objection by the city's counsel, is not a bar to a recovery over against contractors and a surety upon an indemnity contract and bond to save the city harmless from the action, where they refused to appear and defend; since the same amounted to only a dilatory objection and would not have barred another action. *Seattle v. Regan & Co.* 262
5. INDEMNITY—ACCRUAL OF RIGHT OF ACTION—INTEREST. A policy of indemnity insurance covering losses from accidents on the assured's premises is a contract of indemnity against loss and not against liability merely, and no right of action, or right to interest on the loss, accrues until the assured has actually paid the judgment rendered against it. *Puget Sound Imp. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co.* 124
6. INDEMNITY—AGREEMENT TO SAVE HARMLESS FROM JUDGMENTS—CONCLUSIVENESS OF JUDGMENTS—NEGLIGENCE OF CITY CONTRACTOR—BONDS. In an action upon a contract and bond of indemnity given by sidewalk contractors and their surety, wherein they agreed to save the city harmless from all actions and judgments for damages by reason of the negligence of the contractor, a judgment recovered against the city in an action the defense of which was duly tendered to the contractors and surety, is conclusive against them of the fact that a defect existed in the street, and was not properly guarded; the only question remaining being whether the contractors were the responsible cause of the defect. *Seattle v. Regan & Co.* 262
7. SAME—CAUSE OF ACCIDENT—EVIDENCE—SUFFICIENCY—MUNICIPAL CORPORATIONS—STREETS. In an action upon an indemnity bond there is sufficient evidence to sustain a finding that sidewalk contractors were responsible for a defect in a street, consisting of protruding spikes left after tearing up planks, where one of their employees

INDEMNITY—CONTINUED.

testified to having torn out the planks, although he claimed that he drove down all protruding spikes and nails, it having been conclusively determined in another action that he was mistaken in such claim. *Seattle v. Regan & Co.*..... 262

INDIANS:

Recovery of lands held under void deeds, effect of laches, see **EQUITY**, 2.

Quieting title to Indian lands held under void deed, see **QUIETING TITLE**, 5.

1. **INDIANS—LANDS—ALIENATION—TREATIES—CONSTRUCTION.** Under the so-called "Moses agreement" between certain Indian chiefs and the Federal government, in which the government agreed to guarantee and protect the Indians in the possession and ownership of certain lands, to be set apart to them in severalty, the title to the land, until patent issued to the Indians under a subsequent act of Congress, was in the government, in trust for the Indians, who had no power to alienate the lands; especially in view of the subsequent legislative construction by an act of Congress directing the lands "when so selected to be held for the exclusive use and occupancy of said Indians"; and Indian deeds before patent are void. *Starr v. Long Jim* 138
2. **SAME—CONVEYANCE—VOID IN INCEPTION—AFTER ACQUIRED TITLE.** A deed by Indians who had no power to alienate the lands, which is void in its inception because in violation of the laws of the United States, does not convey an after-acquired title by subsequent patents to the Indians, as the same do not inure to the benefit of the purchasers. *Starr v. Long Jim*..... 138

INDICTMENT AND INFORMATION:

Violation of law relating to practice of dentistry, see **PHYSICIANS**, AND **SURGEONS**.

INDUCEMENTS:

To commit crime of practicing dentistry without license, see **PHYSICIANS AND SURGEONS**.

INFANTS:

Right of divorced party to custody, see **DIVORCE**, 9, 10.

Right of minor to bring action for custody and society of wife, see **HUSBAND AND WIFE**, 3.

Former action by guardian as emancipation of minor, see **JUDGMENT**, 7.

Marriage of minors, see **MARRIAGE**.

Care required of master of minor servant, see **MASTER AND SERVANT**, 9.

INJUNCTION:

Appealability of orders relating to injunction, see **APPEAL AND ERROR**, 2.

Against replat or sale of dedicated park, see **DEDICATION**, 1.

Equitable relief from obstructions on right of way, see **EQUITY**, 1.

INNKEEPERS:

Validity of law prescribing imprisonment for fraudulent contraction of innkeeper's bill, see **CONSTITUTIONAL LAW**, 1-3.

INSANE PERSONS:

Instructions on insanity as defense in criminal prosecutions, see **CRIMINAL LAW**, 7-9.

Opinion evidence as to insanity, see **CRIMINAL LAW**, 3.

Burden of proof as to insanity, see **CRIMINAL LAW**, 1.

Insanity as defense to criminal prosecution in general, see **CRIMINAL LAW**, 1, 3, 7-9.

INSOLVENCY:

As affecting appeal from order denying temporary injunction, see **APPEAL AND ERROR**, 2.

Preference of creditors by insolvent debtor, see **FRAUDULENT CONVEYANCES**.

INSPECTION:

Of goods sold, see **SALES**, 5.

INSTRUCTIONS:

Review as dependent on presentation of objection in lower court, see **APPEAL AND ERROR**, 6, 7.

Review as dependent on prejudicial nature of error, see **APPEAL AND ERROR**, 48, 49.

In criminal prosecutions, see **CRIMINAL LAW**, 1, 5-10, 12; **HOMICIDE**, 8-12; **RAPE**, 3.

In civil actions, see **TRIAL**, 11-16.

INSURANCE:

Compromise by insurance company upon breach of contract with agent, see **COMPROMISE AND SETTLEMENT**, 3.

1. **INSURANCE—MARINE INSURANCE—POLICY—MODIFICATION BY PAROL—AUTHORITY OF AGENTS—EVIDENCE—QUESTION FOR JURY.** A policy of marine insurance restricting the vessel to navigation in certain waters may be modified by parol by general agents having authority to write insurance, fix rates, collect premiums and adjust losses, where the policy did not require modifications to be in writing; and there was sufficient evidence to make a question for the jury where it appeared that such agents consented to a voyage to prohibited waters, stating that there would be additional premiums to be paid.

INSURANCE—CONTINUED.

which the agents collected after notice that the vessel was in the prohibited waters and before notice of the loss of the vessel. *Norris v. China Traders' Insurance Co.* 554

2. **SAME—POLICY—PROHIBITED WATERS—WAIVER OF DEVIATION—GENERAL AGENTS.** There is a waiver of restrictions in a marine policy respecting prohibited waters, where general agents made no objection to the fact that the insured vessel was in the prohibited waters, collected additional premiums therefor, stated that the vessel was insured, and received proofs of loss stating that the loss would undoubtedly be paid. *Norris v. China Traders' Insurance Co.*..... 554
3. **SAME—PLEADING—ISSUES AND PROOF—REPLY SETTING OUT MODIFICATION OF POLICY.** In an action upon a policy of marine insurance which had been modified by parol so as to permit a voyage to prohibited waters, it is proper for the plaintiff to allege the effect of the contract without setting it out, and upon an answer setting out parts of the policy and a breach by the voyage, to reply by setting out the original contract and the modification and waiver respecting the prohibited waters. *Norris v. China Traders' Insurance Co.*.. 554

INTENT:

Of parties to contract as affecting construction, see **CONTRACTS**, 1.
 To dedicate land to public use, see **DEDICATION**, 2.
 To grant easement of right of way, see **EASEMENTS**, 1.
 To make gift, see **GIFTS**.

INTEREST:

Allowance of on affirmance of decree of divorce, see **COSTS**.
 Right to include interest in judgment against indemnity company incurred in defense of action by city, see **INDEMNITY**, 1.
 Accrual of interest on loss paid by assured, see **INDEMNITY**, 5.
 Allowance of interest prior to date of lien notice, see **MECHANICS' LIENS**, 1.
 Foreclosure of mortgage for nonpayment of interest, see **MORTGAGES**.
 Allowance after tender, see **TENDER**.

1. **INTEREST—LEGAL RATE—MONEY PAID.** Upon recovery of money paid on a contract to buy land, it is error to allow interest at a greater rate than the legal rate of six per cent. *Davis v. Lee*... 330

INTERROGATORIES:

Filing demand for as constituting appearance, see **APPEARANCE**, 2.

INTOXICATION:

Negligence in setting down intoxicated passenger, see **CARRIERS**, 16.

JOINDER:

By defendants in peremptory challenges to jurors, see **EMINENT DOMAIN**, 11.

JOINT TENANCY:

See **TENANCY IN COMMON.**

1. **JOINT TENANCY—PUBLIC LANDS—PATENT AFTER ABOLISHMENT—HUSBAND AND WIFE—COMMUNITY PROPERTY—DESCENT AND DISTRIBUTION.** A tract of land patented by the United States government to two married men in the state of Washington, after the enactment of the community property law of this state, is the common property of the parties and their wives, and is not held under a joint tenancy, with the right of survivorship, and upon the death of one of the patentees, his interests descend to his wife and children under the laws of descent, and not to the surviving owner. *Stone v. Marshall* 375

JUDGES:

Impeachment by judge of discretionary action in opening default judgment, see **JUDGMENT, 2.**

JUDGMENT:

Conclusiveness of judgment in former action, see **ADVERSE POSSESSION, 1.**

Appealability, see **APPEAL AND ERROR, 1.**

Review in general, see **APPEAL AND ERROR.**

Supersedes on appeal to Federal Supreme Court, see **APPEAL AND ERROR, 10.**

Prejudicial error in not giving notice of signing findings and judgment, see **APPEAL AND ERROR, 50.**

Vacation of divorce decree for fraud and duress, see **DIVORCE, 3-6.**

Modification of decree respecting custody of children, see **DIVORCE, 10.**

Conclusiveness on indemnitor of judgment against person indemnified, see **INDEMNITY, 6.**

Foreclosure of mechanics' lien, see **MECHANICS' LIENS, 10-12.**

On the pleadings, see **PLEADING, 3.**

In suits to quiet title, see **QUIETING TITLE, 3-5.**

Sale of land for nonpayment of tax, see **TAXATION, 2, 3.**

In action perfecting vendor's title as concluding parties in interest from urging defects, see **VENDOR AND PURCHASER, 12.**

1. **JUDGMENT—UPON ADMISSIONS—OPENING STATEMENT OF COUNSEL.** A judgment against the defendant upon the admissions of counsel in his opening statement to the jury, with issues made by the pleadings to be tried out, can only be sustained where the admissions are deliberately made and distinct, and absolutely preclude a recovery. *Gross v. Bennington*..... 417
2. **JUDGMENT—DEFAULT—VACATION—DISCRETION—IMPEACHMENT BY JUDGE.** It is not an abuse of discretion to open a default judgment entered against Indians, and allow them to appear through the United States District Attorney to set aside fraudulent deeds; and having exercised the discretion, it is not competent for the trial judge to impeach the exercise thereof by a subsequent recital in

JUDGMENT—CONTINUED.

- a statement of facts to the effect that there was no sufficient excuse for the long delay in moving to open the default. *Starr v. Long Jim* 138
3. **JUDGMENT—CLERK'S MINUTES—CONCLUSIVENESS—SUBSEQUENT ENTRY OF CONFLICTING JUDGMENT.** A clerk's entry in the journal that the court ordered the case dismissed on defendant's motion, at the close of plaintiff's case, is not conclusive evidence of the actual judgment, and does not preclude the court from subsequently making findings and entering judgment granting the defendant affirmative relief; and the formal judgment controls the clerk's entry. *Gould v. Austin* 457
4. **JUDGMENT—VACATION—GROUNDS—ERROR OF LAW.** A motion to vacate a judgment under Bal. Code, § 5153, cannot be made for error of law. *Warren v. Hershberg* 38
5. **SAME—DILIGENCE—SUFFICIENCY OF SHOWING.** A motion to vacate a judgment for irregularities or fraud under Bal. Code, § 5153, cannot be made more than two years after entry of the judgment without a showing of unavoidable casualty or misfortune preventing the party from defending and diligence in making his motion. *Warren v. Hershberg* 38
6. **JUDGMENT—RECITALS—JUDGMENT ON MERITS—EFFECT—APPEAL—HARMLESS ERROR.** In an action to quiet title a recital in a judgment for the defendant, that "plaintiffs were duly sworn and offered evidence in support of their case" whereupon they rested and the court granted defendant's motion for judgment, authorizes a judgment on the merits, barring the plaintiff from the prosecution of any further action; hence it is harmless error for the court to include in the judgment a provision quieting defendant's title. *Gould v. Austin* 457
7. **JUDGMENT—PERSONS CONCLUDED—PARENT AND CHILD—FORMER ACTION BY GUARDIAN—EMANCIPATION OF MINOR.** In an action by a parent to recover expenses incurred for treatment and loss of services of a minor child, injured in a railway accident, a former action by the guardian of the child, to recover for the minor's personal injuries, is not an emancipation of the child or a bar to a recovery by the parent, where in the former action recovery for expenses and loss of services was expressly excluded from the consideration of the jury. *Harris v. Puget Sound Electric R.* 299

JUDICIAL POWER:

Conferring judicial powers on railroad commission, see **RAILROADS**, 8.

JUDICIAL SALES:

On execution, see **EXECUTION**.

JURISDICTION:

Appellate jurisdiction, see **APPEAL AND ERROR**.

Of action to quiet title and set aside tax deed of other county, see **COURTS**.

In equity, see **EQUITY**.

Of court to administer deceased wife's half only of community, see **EXECUTORS AND ADMINISTRATORS**, 3.

JURY:

Custody and conduct, see **CRIMINAL LAW**, 11.

Examination of jury in condemnation proceedings, see **EMINENT DOMAIN**, 12.

Joinder of defendants in peremptory challenges to jurors, see **EMINENT DOMAIN**, 11.

Separate juries to determine damages in condemnation for street purposes, see **EMINENT DOMAIN**, 9, 10.

Impeachment of verdict by testimony or statements of jurors, see **NEW TRIAL**.

Instructions in civil actions, see **TRIAL**, 11-16.

Questions for jury in civil actions, see **TRIAL**, 7, 8.

1. **JURORS—EXAMINATION—LATITUDE**. In the examination of jurors latitude should be allowed to enable counsel to intelligently exercise peremptory challenges, even though not able to elicit sufficient to justify the rejection of the juror for cause; and a juror may be interrogated as to his connection with indemnity companies. *Hoff v. Independent Asphalt Paving Co.* 672

JUSTIFICATION:

Of homicide, see **HOMICIDE**.

KNOWLEDGE:

Defenses to bills or notes, see **BILLS AND NOTES**, 3.

As element in creation of estoppel, see **ESTOPPEL**, 2.

Master's knowledge of servant's incompetency, see **MASTER AND SERVANT**, 6, 10.

Of danger as element of contributory negligence, see **MASTER AND SERVANT**, 9.

LACHES:

As defense to particular actions or proceedings, see **CANCELLATION OF INSTRUMENTS**, 5.

In prosecuting suit to cancel divorce for fraud, see **DIVORCE**, 5, 6.

As bar to recovery of real estate, see **EQUITY**, 2.

Estoppel of co-owner to set up defense of laches in suit to quiet title, see **ESTOPPEL**, 2.

LANDLORD AND TENANT:

Mutual rescission of contract for assignment of lease, see **CONTRACTS**, 2.

Mechanic's lien for improvements by tenant, see **MECHANICS' LIENS**, 6.

Assessment and sale of leasehold interest in state lands, see **MUNICIPAL CORPORATIONS**, 3-5.

1. **LANDLORD AND TENANT—DANGEROUS PREMISES—INJURY TO SERVANT OF LESSEE—LIABILITY OF OWNER.** The lessor of a sawmill is not liable to the employees of the lessee for injuries sustained by reason of holes in the floor, left to let sawdust and refuse drop into the waters below, where there was no covenant in the lease requiring the landlord to repair, and no concealment or fraud on his part, and he retained no control or supervision over the premises. *Baker v. Moeller* 605

LANDS:

Indian lands, see **INDIANS**.

LARCENY:

Transfer of property to attorney by defendant as fraudulent conveyance, see **FRAUDULENT CONVEYANCES**, 1.

LEASES:

Mutual rescission of contract for assignment of lease, see **CONTRACTS**, 2.

LEGISLATIVE POWER:

Conferring of on railroad commission, see **RAILROADS**, 7.

LICENSES:

To practice dentistry, see **PHYSICIANS AND SURGEONS; CONSTITUTIONAL LAW**, 4.

Fraud in securing marriage license for minor, see **MARRIAGE**.

LIENS:

Liens of mechanics and materialmen, see **MECHANICS' LIENS**.

Tax lien, see **TAXATION**.

Of co-owner upon payment of taxes, see **TENANCY IN COMMON**, 2.

LIMITATION:

Of liability under policy of accident indemnity insurance, see **INDEMNITY**, 1.

LIMITATION OF ACTIONS:

See **ADVERSE POSSESSION**.

Reasonable time for commencement of action for rescission of sale of land, see **CANCELLATION OF INSTRUMENTS**, 5.

As affecting laches in recovery of real estate, see **EQUITY**, 2.

LIMITATION OF ACTIONS—CONTINUED.

1. **LIMITATION OF ACTIONS—ACCRUAL—TRUSTS—CESSATION OF TRUSTS—CANCELLATION OF INSTRUMENTS.** The statute of limitations does not run against an action the gist of which was to set aside a deed to grantor's son, made in trust upon false representations, until the son repudiates the trust; although there were some allegations of fraud and undue influence, and an action for relief on the ground of fraud is to be commenced within three years after discovery of the fraud. *Garvey v. Garvey*..... 516
2. **LIMITATION OF ACTIONS—COMMENCEMENT OF ACTIONS—STATUTES—CONSTRUCTION.** An action is commenced at the time the complaint is filed, within the provisions of our statute of limitations. *Lars v. Sandell* 53

LIMITATION OF LIABILITY:

Of carrier of goods in general, see **CARRIERS**, 3, 11-13.

LIVE STOCK:

Negligence in transportation of, see **CARRIERS**, 4-7.

LOGS AND LOGGING:

Opinions of experts as to unsafe method of loading on sled, see **EVIDENCE**, 5.

Action for loss of poles cut under contract and lost by negligent setting of fire, see **FIRES**.

Injuries to servant in hauling logs, see **MASTER AND SERVANT**, 13.

1. **LOGS AND LOGGING—BOOMS—UNLAWFUL MAINTENANCE—REPLEVIN—TITLE OF PLAINTIFF.** A boom company that acquires possession of logs by the maintenance of a boom in violation of a decree of court is a trespasser and wrongdoer and cannot maintain replevin on the theory that defendant unlawfully opened plaintiff's boom; since in replevin the plaintiff must succeed, if at all, upon the strength of his own title. *North Shore Boom & Driving Co. v. Nicomen Boom Co.* 564

MACHINERY:

Liability of employer for defects, see **MASTER AND SERVANT**, 9, 11, 12.

MANDAMUS:

1. **MANDAMUS—PLEADING—ANSWER.** Upon application for a writ of mandamus, the defendant may both demur and answer. *State ex rel. Trickett v. Superior Court*..... 13

MARRIAGE:

Privileges and disabilities of coverture, see **HUSBAND AND WIFE**.

As revoking will, see **WILLS**, 2.

1. **MARRIAGE—VALIDITY—FRAUD IN SECURING LICENSE.** Fraud or forgery in securing a marriage license for a minor without the consent of the parents does not invalidate the marriage, there being no statute so providing. *In re Hollopeter*..... 41

MARRIAGE—CONTINUED.

2. **SAME—MARRIAGE OF MINOR—AGE OF CONSENT.** A female of the age of fourteen is within the common law age of consent, and is not, as a matter of law, incapable of contracting marriage. *In re Hollopeter* 41
3. **SAME—EFFECT OF STATUTE.** The law fixing the age of eighteen as the age under which a female cannot consent to carnal knowledge does not overcome the common law age of consent to marry. *In re Hollopeter* 41
4. **SAME—ANNULMENT—ACTIONS BY PARENTS OF MINOR—PARTIES—CAPACITY TO SUE.** Parents cannot maintain an action to annul the marriage of their minor child who was incapable of consenting because under legal age, procured by fraud and without the parent's consent; since Bal. Code, § 4477, authorizes such actions only at the suit of the party under disability. *In re Hollopeter*..... 41

MARRIED WOMEN:

See HUSBAND AND WIFE.

MASTER AND SERVANT:

- Harmless error in admission of contract to show relation of, see **APPEAL AND ERROR**, 45.
- Employees of carrier as passengers, see **CARRIERS**, 8, 9.
- Injuries to employees while passengers on trains, see **CARRIERS**, 8-10, 15, 20, 22.
- Discharge of contract for personal services by death of party, see **CONTRACTS**, 3.
- Contracts of employment by corporation, see **CORPORATIONS**, 2-5, 7.
- Liability of lessor for injury to servant of lessee by defective premises, see **LANDLORD AND TENANT**.
- Liability of principal for acts of agent, see **PRINCIPAL AND AGENT**, 1.
1. **MASTER AND SERVANT—RELATION—EVIDENCE.** A contract purporting to be signed by the defendant, under which the ship was operated by defendant and it received its share of the profits, is admissible in evidence to show ownership, without proof of its execution. *Nelson v. Western Steam Navigation Co.*..... 177
 2. **MASTER AND SERVANT—RELATION—EVIDENCE—OWNERSHIP OF VESSEL.** In an action by a sailor to recover damages for personal injuries from the owner of the ship, evidence is admissible as to repairs and damages paid by defendant, resulting from a collision with another vessel, as tending to show the defendant's ownership and operation. *Nelson v. Western Steam Navigation Co.*..... 177
 3. **MASTER AND SERVANT—RELATION—SHIPPING—PROOF OF OWNERSHIP OF VESSEL—EVIDENCE—SUFFICIENCY.** In an action for personal injuries sustained by a sailor, there is not sufficient evidence that defendant, a corporation whose officers were nonresidents, was the owner of the steamship or had any control over it, and a nonsuit is properly granted, where the evidence merely showed that de-

MASTER AND SERVANT—CONTINUED.

defendant's name was painted across the bow, its stationery, tickets, and shipping receipts used, the ship was running under a bond theretofore given in defendant's name, and one of its stockholders had signed the name of agents to a contract agreeing to run the ship in defendant's name, such contract clearly showing that defendant had no control of the ship or share in its profits, and there was no evidence tending to show actual or constructive notice by the defendant of any of the above facts, and it appeared that the defendant had previously sold its line of steamers and was not operating any. *Nelson v. Western Steam Navigation Co.* 177

4. MASTER AND SERVANT—RELATION—LIABILITY OF OWNERS OF VESSEL—CHARTER—EFFECT—CONSTRUCTION. There is no such complete demise or charter of a steamship as will make the charterers owners *pro hac vice* and release the general owners from liability for injuries to a sailor caused by reason of the negligence of the mate, where the agreement for the operation of the ship by the charterers provided for a division of the earnings, and as construed by the parties, the general owners "had more or less control of the ship," employed the captain and chief engineer (the captain employing the mate) and paid for repairs, expenses, and damages arising in the operation; since the fact that the charterers could not discharge the captain without the consent of the general owners, establishes the relation of master and servant between the owners and captain. *Nelson v. Western Steam Navigation Co.* 177
5. SAME—OBSTRUCTIONS NEAR TRACK—PROXIMATE CAUSE OF INJURY. The maintenance of a coal chute dangerously near a railroad track is the proximate cause of an injury to one who, in the line of his duty, has occasion to look out the side door of a box car. *Smith v. Spokane Falls & Northern R. Co.* 350
6. MASTER AND SERVANT—FELLOW SERVANTS—MASTER'S KNOWLEDGE OF INCOMPETENCY—PRESUMPTION—EVIDENCE—SUFFICIENCY—OPINIONS. The opinion of a single witness that a fellow servant was timid and therefore incompetent to drive a winch, without proof of a single prior negligent act, is not sufficient to charge the master with notice of his incompetency, or overcome the presumption that the master had performed his duty in employing competent fellow servants. *Long v. McCabe & Hamilton* 422
7. MASTER AND SERVANT—INJURIES TO SEAMAN—NEGLIGENCE OF MASTER—VICE PRINCIPALS—EVIDENCE—SUFFICIENCY. There is sufficient evidence of negligence to render the owner of a steamship liable to a sailor who was injured while assisting to load a boiler plate, where it appears that the mate, who was drunk, ordered him to pry on the plate with a crowbar, and then without warning, and while his back was turned, started the steam winch with a jerk, causing the fall rope to break and the plate to fall and injure the plaintiff; as the mate is a vice principal and not a fellow servant of the seaman. *Nelson v. Western Steam Navigation Co.* 177

MASTER AND SERVANT—CONTINUED.

8. **MASTER AND SERVANT—OBSTRUCTIONS NEAR RAILROAD TRACK—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.** The foreman of a wrecking crew in charge of a large number of laborers being transported in box cars, charged with the duty of looking after their safety, is not guilty of contributory negligence, as a matter of law, in looking out of the side of the car to discover the cause of an alarm and the swaying of the cars indicating danger ahead, whereby he was struck by a coal chute of which he had no knowledge and which was negligently constructed nine inches nearer to the tracks than the ordinary minimum distance, the side doors of the cars being the only way of egress; as his judgment in such case cannot be too closely scanned. *Smith v. Spokane Falls & Northern R. Co.* 350

9. **MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—KNOWN DANGERS—MOMENTARY FORGETFULNESS.** The rule that momentary forgetfulness of known dangers does not necessarily constitute contributory negligence by a servant, applies (with due regard to the circumstances) to machinery and appliances with which or upon which the servant is working, especially in case of an inexperienced or youthful employee obeying an order to hurry. *Passage v. Stimson Mill Co.* 661

10. **MASTER AND SERVANT—FELLOW SERVANTS—DUTY OF MASTER—PRESUMPTION—OCCURRENCE OF NEGLIGENT ACT—BURDEN OF PROOF.** While it is the duty of the master to make a reasonable effort to ascertain the competency of a servant, negligence in that respect is not presumed from the occurrence of an accident through such servant's neglect, but the burden is on plaintiff to prove (1) the fellow servant's incompetence and (2) that the master knew or should have known thereof. *Long v. McCabe & Hamilton* 422

11. **MASTER AND SERVANT—DEFECTIVE APPLIANCE—DESCRIPTION—EVIDENCE—RE MOTENESS.** In an action for personal injuries caused through the negligent adjustment of a pump, a description of the conditions five years before the accident is not inadmissible as too remote, where other evidence indicated that it was in the same general condition at the time of the accident, and the record on appeal fails to show that there was any material difference at the different times; the determination of the matter of remoteness being largely discretionary. *Passage v. Stimson Mill Co.* 661

12. **MASTER AND SERVANT—NEGLIGENCE OF MASTER—APPLIANCES—EVIDENCE OF SURROUNDINGS—ADMISSIBILITY.** In an action for personal injuries sustained by a servant in starting a pump, whereby his hand was crushed in a narrow space between a fly-wheel and the framework, it is proper to refuse to strike out evidence showing a limited working space between the wall and the fly-wheel, more or less affecting the method of work and explaining the surroundings,

MASTER AND SERVANT—CONTINUED.

- although the plaintiff admitted on cross-examination that his hand was not caught there and that it did not have anything to do with the injury. *Passage v. Stimson Mill Co.* 661
13. MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE OF MASTER—METHODS OF WORK—LOADING LOGS—EVIDENCE—SUFFICIENCY. There is not sufficient evidence of negligence in loading logs on a sled to entitle a teamster to recover for injuries sustained by reason of the slipping and falling of logs from the load, and a nonsuit is properly granted, where it appears that the fall was due to the fact that the front bob of the sled broke through the ice into a rut, causing the load to lurch and sway, that the logs were loaded and secured in the usual manner employed in that and other camps, that all such loads were more or less unsafe and that the teamster, a man of experience, had opportunity to observe the manner in which the load was secured, but failed to do so; and there is no presumption of negligence from the fact that an accident happened in such a case. *Hogg v. Standard Lumber Co.* 5
14. MASTER AND SERVANT—FELLOW SERVANTS—NEGLIGENCE OF MASTER—SHIFTING BURDEN OF PROOF—EXPLANATIONS OF DEFENDANT—EVIDENCE—SUFFICIENCY. Negative evidence of the incompetence of a fellow servant to run a winch, consisting of the opinion of a single witness that he was incompetent, the fact that witnesses had never seen him run a winch, the fact that he asked instructions how to run it, and the fact of the negligent act complained of, if sufficient to cast the burden of proof upon the master to show the exercise of due care in employing him, is destroyed and overcome, as a matter of law, by defendant's positive evidence that the servant had driven winches off and on for twenty years, and he had driven winches on specified vessels, and for several hours on one vessel with the plaintiff, and that he had a good reputation and was qualified as a winch driver, and that the act complained of was done according to a fixed custom to carry an empty sling out over the deck without stopping for a second signal; and the burden having again shifted and so still being upon the plaintiff to establish his case, a nonsuit is properly granted; since negative evidence must give way to positive evidence, and what amounts to a *prima facie* case may not be so when rebutted. *Long v. McCabe & Hamilton* 422
15. SAME—NEGLIGENCE OF MASTER IN EMPLOYING SERVANT—EVIDENCE—SUFFICIENCY—NEGLIGENT ACTS. The rule that evidence of negligent acts of a fellow servant from which incompetency might be inferred makes a *prima facie* case that the master was negligent in employing him, is not to be extended to a case where his only negligent act was the act complained of. *Long v. McCabe & Hamilton* 422

MEASURE OF DAMAGES:

For fraud in misrepresenting solvency of corporation, see FRAUD, 11.
For failure to deliver goods, see SALES, 6.

MECHANICS' LIENS:

1. **MECHANICS' LIENS—INTEREST.** Interest is allowable on a mechanics' lien from the date of filing of the lien notice. *Cornelius v. Washington Steam Laundry*..... 272
2. **SAME—ITEMS LIENABLE—PROFIT ON LABOR.** The judgment on a lien for labor and material furnished in the construction of a building may include a commission of fifteen per cent on the cost, as profit, where the contract provides therefor, and defendants offer no evidence to support their denial of the contract. *Cornelius v. Washington Steam Laundry* 272
3. **MECHANICS' LIENS—SUBCONTRACTOR—LIEN FOR SUMS PAID FOR LABOR.** A person employed to do the plastering upon a building for the contractor, to be paid therefor the amount paid out to his men and a further sum for his own work and superintendence, is entitled to a lien for the amounts paid by him for the labor of his men, and for his own labor, according to the terms of the contract, although he did none of the actual work of the plastering, under Bal. Code, § 5900, giving a lien to any laborer for labor performed, and Bal. Code, § 5909 giving a lien to a contractor for any sum due on his contract after deducting claims of other parties for labor performed, and Bal. Code, § 5917, requiring the lien laws to be liberally construed. *Smyth v. Lance & Peters*..... 560
4. **MECHANICS' LIENS—NOTICE—VERIFICATION—DEFECTS—AMENDMENT ON APPEAL.** That the verification of a lien notice stated the notice to be "true" instead of "just" goes to the form rather than the substance, and is without prejudice and will be considered amended on appeal, where the record fails to show that the defect was pointed out below. *Cornelius v. Washington Steam Laundry*..... 272
5. **MECHANICS' LIENS—NOTICE—AMENDMENTS—AFTER SUIT—ERROR IN DESCRIPTION.** Under Bal. Code, § 5904, authorizing the amendment of lien notices where interests of third parties are not affected, a lien notice and complaint to foreclose the same can be amended to correct an erroneous description of the property, after answer by the defendant disclosing the error in the notice. *Malfa v. Orisp* 509
6. **SAME—DEFENSES—LEASEHOLD—PERSONALTY.** In the foreclosure of a mechanics' lien upon a building constructed by the defendant holding a leasehold interest, the defendant cannot raise the question that part of the labor and material furnished is personalty and not subject to a lien; as the lien is subject to the lease, and whatever is done becomes part of the leasehold. *Cornelius v. Washington Steam Laundry* 272
7. **SAME—FORECLOSURE—EVIDENCE OF DEBT.** In an action to foreclose a mechanics' lien there is sufficient evidence of the debt and that it was due, where the parties had agreed that a certain part of it was due, the balance to be adjusted on final settlement. *Cornelius v. Washington Steam Laundry*..... 272

MECHANICS' LIENS—CONTINUED.

8. SAME—DEFENSES—PAYMENT BY NOTE—EVIDENCE—SUFFICIENCY. In an action to foreclose a mechanics' lien, findings that the debt was not paid by a note are sustained, where there was testimony that the note was only given that the claimants might negotiate it if possible, and was returned by them next day and left on refusal to accept the return, and that it was sent back to claimants by mail the next day, since which both parties disclaim knowledge or possession of it, although there was conflicting evidence. *Cornelius v. Washington Steam Laundry*..... 272
9. SAME—PROCEDURE. Under Bal. Code, § 5917, all proceedings on the foreclosure of a mechanics' lien are to be liberally construed. *Cornelius v. Washington Steam Laundry*..... 272
10. MECHANICS' LIENS—PERSONAL LIABILITY—JUDGMENT—JOINT OR SEVERAL JUDGMENT. In an action to foreclose a mechanics' lien, it is error to enter a joint judgment for the value of the material against the several owners of two houses to whom the material was delivered in common and so charged against them, where it was agreed that, the houses being identical, the delivery should be in common, but that each should pay one-half of the value thereof, to be taken out of their several salaries, each being employed by the plaintiff. *Argo Manufacturing Co. v. Parker*..... 166
11. SAME—DECREE—DESCRIPTION OF LIEN—APPEAL—DECISION. That a decree foreclosing a mechanics' lien fails to describe the lien notice is not ground for reversal, where the court had jurisdiction and the rights of third parties are not involved and the whole record discloses that the decree was proper. *Cornelius v. Washington Steam Laundry* 272
12. SAME—AMOUNT OF LAND—LEASEHOLD—APPEAL—REVIEW. It is not ground for reversal of a decree foreclosing a mechanics' lien on a leasehold that the amount of land to be sold was not described, since the leasehold would probably have to be sold as an entirety, especially where the record discloses no reference to the point in the court below. *Cornelius v. Washington Steam Laundry*..... 272
13. SAME—PLEADINGS—ISSUES—LIEN NOTICE—AMENDMENT—APPEAL—OBJECTIONS. Where the complaint alleges the due execution and filing of a claim for lien, attached to and made a part of the complaint, and the answer does not deny the execution and admits the filing, the perfection of the lien is an admitted fact; since the lien may be amended and all objections to its sufficiency must be raised below at the time it is offered. *Cornelius v. Washington Steam Laundry* 272

MEMORANDA:

Required by statute of frauds, see FRAUDS, STATUTE OF, 2.

MERGER:

Of contract upon acceptance of deed, see DEEDS, 2.

MISCONDUCT:

Of judge in comment on evidence, see TRIAL, 10.
Of counsel, see TRIAL, 3-6.

MISREPRESENTATION:

See FRAUD.
Affecting validity of contract for sale of land, see VENDOR AND PURCHASER, 1, 2.

MISTAKE:

Basis of claim for adverse possession, see ADVERSE POSSESSION, 3.
Ground for reformation of instrument, see REFORMATION OF INSTRUMENTS.

MODIFICATION:

Of decree of divorce, see DIVORCE, 10.
Of marine insurance policy by parol, see INSURANCE.
Of contract for sale of land, see VENDOR AND PURCHASER, 1, 2, 5-7.

MONEY PAID:

Rate of interest on recovery of money paid on contract for land, see INTEREST.

MORTGAGES:

Scope of review on appeal from dismissal of foreclosure action, see APPEAL AND ERROR, 19.
Of personal property, see CHATTEL MORTGAGES.
Parol evidence to show deed and option as mortgage, see EVIDENCE, 2.
In fraud of creditors, see FRAUDULENT CONVEYANCES.
Dismissal of action on showing deeds intended as mortgages, see QUIETING TITLE, 3.
By strangers by mistake as cloud on title warranting rescission, see VENDOR AND PURCHASER, 7.

1. MORTGAGES—RIGHT TO FORECLOSE—DEFAULT IN INTEREST—MATURITY OF DEBT—FAILURE TO ELECT. A clause in a mortgage providing that, in the case of the nonpayment of any interest when due, the whole principal and interest shall immediately become due and payable and that the mortgage may be foreclosed for the whole sum, is for the benefit of the mortgagee, and is waived by failure of the mortgagee to elect to consider the whole sum due prior to due tender of the interest. *Coman v. Peters*..... 574

MOTIONS:

To dismiss appeal, see APPEAL AND ERROR, 16.

MUNICIPAL CORPORATIONS:

Damages for injuries from defective street or sidewalk, see **DAMAGES**, 3, 7.

Dedication and establishment of streets, see **DEDICATION**, 2.

Condemnation by city for public improvements, see **EMINENT DOMAIN**, 5-12.

Liability of person causing defects in streets to indemnify city for damages recovered by person injured, see **INDEMNITY**, 4, 6, 7.

Collision of street cars with persons or vehicles on track, see **STREET RAILROADS**.

1. **MUNICIPAL CORPORATIONS—ORDINANCES — PLEADING— REPLY—ISSUE RAISED.** Where an answer alleges that a city ordinance was duly passed, a denial in the reply merely questioning the power of the city to pass the ordinance, does not put in issue the regularity of the preliminary steps leading up to its passage. *Davison v. Walla Walla* 453
2. **SAME—CONSTRUCTION OF ORDINANCE—SUPERSTRUCTURE AS BUILDING.** Damage by fire to the "extent of thirty per cent of the value" of a wooden building which rested on a concrete foundation, within the meaning of a fire limits ordinance, has reference to thirty per cent of the value of the superstructure, exclusive of the foundation, where the regulations as to fire limits authorized the construction of buildings the outer walls of which were made of brick and mortar and iron, or stone and mortar; since the foundation was within the requirements. *Davison v. Walla Walla*..... 453
3. **MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS — ASSESSMENTS— STATE LANDS—LEASEHOLDS—STATUTES — CONSTITUTIONAL LAW—DUE PROCESS.** Laws 1907, p. 123, providing for the assessment of the entire fee of state lands benefited by local improvements, and if the same has been leased, that the leasehold interest may be sold to satisfy the entire assessment, is void, as depriving the lessee of his property without due process of law. *Coast Land Co. v. Seattle*.. 380
4. **SAME.** Such an assessment cannot be sustained in a given case where only the leasehold interest was benefited by the improvement, since the lessee has not had his day in court to question the benefit, where the assessment was not made against the leasehold. *Coast Land Co. v. Seattle*..... 380
5. **SAME—SALE OF LEASEHOLD TO SATISFY ASSESSMENT AGAINST FE.** Laws 1905, p. 267, providing for the assessment and sale of the leasehold of state lands as a separate entity, when benefited by a local improvement, cannot be invoked to sustain a sale of leasehold interests under an assessment of the entire fee. *Coast Land Co. v. Seattle* 380
6. **SAME—POLICE POWER—FIRE LIMITS.** A city may enforce provisions respecting fire limits under its police power without resorting to judicial proceedings. *Davison v. Walla Walla*..... 453

MUNICIPAL CORPORATIONS—CONTINUED.

7. SAME—PROVISIONS OF CHARTER—VALIDITY OF FIRE LIMITS—ORDINANCE—REPAIR OF DAMAGED BUILDING. Under a charter provision authorizing a city to prohibit, within fire limits, the erection of any wooden building or addition, and to provide for their removal if erected contrary to such provision, the city council has power to pass an ordinance creating fire limits and prohibiting the repair of any wooden building therein that had been damaged by fire to the extent of 30 per cent of its value. *Davison v. Walla Walla*..... 453
8. STREETS—VACATION OF ALLEY—REVERSION TO LOT—DEEDS—PROPERTY CONVEYED. Upon the vacation of an alley it becomes attached to the lots as the property of the abutting owner, under Bal. Code, § 1269, and the title thereto passes under a conveyance of the lots, as a part of such lots. *Norton v. Gross*..... 341
9. MUNICIPAL CORPORATIONS—STREETS—DEFECTS—LIABILITY OF CONTRACTOR—CONTRIBUTORY NEGLIGENCE. A contractor doing street work under a contract with the city is responsible for negligence in putting down a plank rendering the street unsafe to one alighting from a street car at a regular stopping place, upon what she was warranted in supposing to be a platform for passengers to alight on; and one so alighting is not guilty of contributory negligence. *Hoyt v. Independent Asphalt Paving Co.*..... 672
10. SAME—PLEADING AND PROOF—VARIANCE. In an action against a contractor for personal injuries sustained through a defective condition of the street, it is not a material variance or prejudicial error to receive in evidence the defendant's contract with the city showing its duty to keep the streets in safe repair, without having alleged the contract, where the complaint specifically charges defendant's acts of negligence which caused the unsafe condition and the accident; since proof establishing the responsibility does not constitute variance. *Hoyt v. Independent Asphalt Paving Co.*..... 672
11. MUNICIPAL CORPORATIONS—ACTIONS—CLAIMS—AS CONDITION PRECEDENT—REASONABLENESS OF REQUIREMENTS—STATEMENT OF CLAIMANT'S RESIDENCE. It is an unreasonable requirement that a claimant for damages against a city shall state his residence for one year last past, in a claim to be filed with the city, as a condition precedent to action against the city, and hence one that the city has no power to enforce by ordinance. *Scherrer v. Seattle*..... 4
12. MUNICIPAL CORPORATIONS—CLAIMS FOR INJURIES—NOTICE—SUFFICIENCY. A notice of a claim against a city, required to be given within thirty days after the accident, filed in January, 1905, and stating that the accident occurred December 27, 1905, shows with reasonable certainty that December 27, 1904, was intended, and is sufficient. *King v. Spokane*..... 601
13. SAME—REJECTION OF CLAIM—REASONS. The reasons of the city council for rejecting a claim against the city, misdated by mistake, are immaterial. *King v. Spokane*..... 601

MURDER:

See HOMICIDE.

NATIONAL BANKS:

Title to real estate acquired by, see BANKS AND BANKING, 2.

NECESSITY:

For administering upon estate of nonresident decedent, see EXECUTORS AND ADMINISTRATORS, 1.

For findings in equity, see TRIAL, 17.

NEGLIGENCE:

In setting down passengers, see CARRIERS, 16.

Limitation of liability of carrier for negligence, see CARRIERS, 3, 10, 11-13.

Of carrier causing loss of or injury to goods or baggage, see CARRIERS, 3, 11-13.

Of carriers in carriage of live stock, see CARRIERS, 4-7.

Of passenger, see CARRIERS, 23-26.

Personal injuries to passengers in general, see CARRIERS, 15-26.

Presumption of negligence in action for injuries to passengers, see CARRIERS, 18, 19.

Damages in general, see DAMAGES.

Damages for causing death, see DEATH.

Action for loss from negligently setting out fire, see FIRES.

Judgment against city as conclusive of contractor's negligence, see INDEMNITY, 6.

Demised premises, see LANDLORD AND TENANT.

Contributory negligence of servant, see MASTER AND SERVANT, 8, 9, 13.

Of employers, see MASTER AND SERVANT.

Injuries from defects or obstruction in streets, see MUNICIPAL CORPORATIONS, 9-13.

Liability on official bond for escape of prisoners, see SHERIFFS AND CONSTABLES.

Of person injured by street car, see STREET RAILROADS, 3.

In operation of street railroads, see STREET RAILROADS, 1, 2.

Of vendee as defense in action for rescission for fraud of agent, see VENDOR AND PURCHASER, 2.

NEW TRIAL:

On appeal for inadequacy of verdict for damages to property, see APPEAL AND ERROR, 25.

In prosecution for rape, see RAPE, 4.

1. NEW TRIAL—AFFIDAVIT—IMPEACHING VERDICT—EVIDENCE OF HAND-WRITING. That two jurors were not satisfied with evidence of the genuineness of certain writings received in evidence until after resorting to a comparison with writings erroneously admitted, is not ground for a new trial. *State v. Simmons*..... 132

NEW TRIAL—CONTINUED.

2. **SAME—INCAPACITY OF JUROR—HEARSAY.** An affidavit of an attorney to the effect that a juror had become so ill as to be unable to participate in the deliberations of the jury is hearsay and insufficient as ground for a new trial. *State v. Simmons*..... 132

NONRESIDENTS:

Necessity for administration of estates of, see **EXECUTORS AND ADMINISTRATORS**, 1.

NONSUIT:

On trial, see **TRIAL**, 7, 9.

NOTICE:

Of appeal, see **APPEAL AND ERROR**, 9.

Harmless error in failure to give notice of signing findings and judgment, see **APPEAL AND ERROR**, 50.

Effect of assignment of claim without notice to debtor, see **ASSIGNMENTS**.

Defenses to bill or note, see **BILLS AND NOTES**, 3.

Constructive notice to corporation of contract by officer with third person, see **CORPORATIONS**, 8.

Of time and place of sale, see **EXECUTION**, 2.

To creditors in probate of foreign will, see **EXECUTORS AND ADMINISTRATORS**, 4.

To master of servant's incompetency, see **MASTER AND SERVANT**, 6, 10, 15.

Of lien claim, see **MECHANICS' LIENS**, 1, 4, 5, 11, 13.

Claim for injury from defects or obstructions in street, see **MUNICIPAL CORPORATIONS**, 11-13.

Sufficiency of recordation to impart notice, see **RECORDS**.

To vendor of lien on goods sold under warranty, see **SALES**, 7.

In foreclosure of delinquency tax certificate, see **TAXATION**, 2.

OBJECTIONS:

Review as dependent on objection or exception made on trial, see **APPEAL AND ERROR**, 3-8.

To confirmation of execution sale, see **EXECUTION**, 3.

At trial, see **TRIAL**, 2.

OBSTRUCTIONS:

Enjoining obstructions on right of way, see **EQUITY**, 1.

Near railroad track as proximate cause of injury, see **MASTER AND SERVANT**, 5.

OFFICERS:

False representations of officer as affecting liability of bank, see **BANKS AND BANKING**, 1.

Action on county official's bond, see **BONDS**.

Certiorari to review acts and proceedings of public officers, see **CERTIORARI**.

OFFICERS—CONTINUED.

Compensation of corporate officer, see **CORPORATIONS**, 2-7.

Acts of corporate officers constituting dedication of park, see **DEDICATION**, 3.

Liability on official bond for escape of prisoners, see **SHERIFFS AND CONSTABLES**.

OPENING:

Judgment, see **JUDGMENT**, 2, 4, 5.

OPINION EVIDENCE:

In criminal prosecution, see **CRIMINAL LAW**, 3.

In civil actions, see **EVIDENCE**, 3-7.

OPINIONS:

Fraudulent representations as to matters of fact or of opinions, see **FRAUD**, 2.

As to incompetency of servant as charging master with notice, see **MASTER AND SERVANT**, 6.

ORDERS:

Review of appealable orders, see **APPEAL AND ERROR**, 2.

ORDINANCES:

Municipal ordinances, see **MUNICIPAL CORPORATIONS**, 1, 2.

PARENT AND CHILD:

Action by guardian for injuries to minor as bar to recovery for loss of services, see **JUDGMENT**, 7.

Right of action to annul marriage of minor, see **MARRIAGE**, 4.

PARKS:

Dedication of to public use, see **DEDICATION**, 1, 3.

PAROL AGREEMENTS:

Effect and requirements of statute of frauds, see **FRAUDS, STATUTE OF**, 1.

PAROL EVIDENCE:

See **EVIDENCE**, 2.

To overcome written record of settlement, see **COMPROMISE AND SETTLEMENT**, 1.

Modification of marine insurance policy, see **INSURANCE**.

PARTIES:

Service on parties of notice of appeal, see **APPEAL AND ERROR**, 9.

Jurisdiction conferred by appearance of parties, see **COURTS**.

In condemnation proceedings, see **EMINENT DOMAIN**, 4, 5.

Admissions as evidence, see **EVIDENCE**, 1.

Husband or wife, see **HUSBAND AND WIFE**, 3.

In action to annul marriage of minor, see **MARRIAGE**, 4.

In suit to quiet title, see **QUIETING TITLE**, 3.

Parties within restriction limiting number of witnesses, see **TRIAL**, 1.

PARTNERSHIP:

1. **PARTNERSHIP—ACTIONS—CONDITIONS PRECEDENT—FILING CERTIFICATE OF FIRM NAME—STATUTES—COMPLIANCE AFTER SUIT BROUGHT.** Where copartners did business under a firm name other than the true name of the firm members, without filing a certificate in the county auditor's office designating their true names, as required by Laws 1907, p. 288, which further provides that they shall not be entitled to maintain any suit without alleging and proving the filing of such certificate, there is such a substantial compliance with the statute as to prevent dismissal of an action, commenced before the filing of the certificate, where long before trial they filed the certificate and obtained leave to amend their complaint, which amendment was made before the statute of limitations had run against their action and after answer by the defendants, who did not stand upon the demurrer, since the defendants are not prejudiced thereby. *Malfa v. Crisp* 509

PASSENGERS:

Who are, see **CARRIERS**, 8, 9.

PASSES:

Liability to persons riding on passes, see **CARRIERS**, 8, 10, 20, 22.

PATENTS:

Character of estate in lands patented to married men after enactment of community property law, see **JOINT TENANCY**.

PAYMENT:

Burden of proof to show payment of wages to corporate officer, see **CORPORATIONS**, 4.

Before completion of work as defense in action on indemnity bond, see **PRINCIPAL AND SURETY**.

Of customs duty by vendee and recovery under warranty of sale, see **SALES**, 7.

Effect of payment of taxes by co-owner, see **TENANCY IN COMMON**, 2.

Of consideration for option, see **VENDOR AND PURCHASER**, 11.

1. **PAYMENT—ASSIGNMENTS—COMPROMISE AND SETTLEMENT.** An assignment of a claim by a creditor to the debtor constitutes a settlement and payment of the claim. *Dial v. Inland Logging Co.*... 81

PEREMPTORY CHALLENGES:

See **JURY**.

PERFORMANCE:

Discharge of contract by death of party, see **CONTRACTS**, 3, 4.

Financial inability to perform as defense in action for breach of option contract, see **VENDOR AND PURCHASER**, 16.

Necessity for tendering performance, see **VENDOR AND PURCHASER**, 14.

PERJURY:

Want of penalties for as invalidating railroad commission act, see **RAILROADS**, 4.

PERSONAL INDIGNITIES:

As ground for divorce, see **DIVORCE**, 2.

PERSONAL INJURIES:

Remission of erroneous item in judgment for, see **APPEAL AND ERROR**, 51.

To passenger, see **CARRIERS**, 15-26.

Measure of damages, see **DAMAGES**, 1, 2.

Inadequate and excessive damages, see **DAMAGES**, 3-6.

Evidence of cause of injury, see **DAMAGES**, 7.

Accident indemnity insurance, see **INDEMNITY**, 1, 4-7.

From defective condition of demised premises, see **LANDLORD AND TENANT**.

To employee, see **MASTER AND SERVANT**.

From defects or obstructions in street or public place, see **MUNICIPAL CORPORATIONS**, 9-13.

To persons on cars or on or near street railroad tracks, see **STREET RAILROADS**.

PHYSICIANS AND SURGEONS:

Validity of law requiring diploma from applicant for license to practice dentistry, see **CONSTITUTIONAL LAW**, 4.

1. **PHYSICIANS AND SURGEONS—INFORMATION—SUFFICIENCY—PRACTICING DENTISTRY WITHOUT LICENSE.** An information for practicing dentistry without a license, in the language of the statute, is sufficient without alleging the nature of the disease or lesion or the treatment. *State v. Littooy*..... 87
2. **PHYSICIANS—DENTISTS—PRACTICING WITHOUT A LICENSE—PROSECUTION—EVIDENCE OF INDUCEMENTS.** That a witness went to a dentist's office and had a cavity filled, is not evidence that he offered inducements to the defendant to commit the crime of practicing without a license. *State v. Littooy*..... 87
3. **SAME—ABSENCE OF LICENSE—EVIDENCE—ADMISSIBILITY.** Bal. Code, § 3030, making the certificate of the county auditor that no license to the defendant to practice dentistry was on file in his office *prima facie* proof of the absence of such license, is not exclusive and does not preclude evidence of the deputy auditor that there was no such certificate of record. *State v. Littooy*..... 87
4. **SAME—EVIDENCE OF TREATING OF DISEASE—SUFFICIENCY.** That a dentist filled a cavity in the teeth of the prosecuting witness is sufficient evidence that he treated a disease or lesion of the teeth, within the statute prohibiting the same without first securing a license. *State v. Littooy*..... 87

PHYSICIANS AND SURGEONS—CONTINUED.

5. **SAME—DEFENSES.** That a witness had dentistry work done with a view to prosecuting the dentist for practicing without a license, is not a defense nor any objection to conviction. *State v. Littooy* 87

PLEADING:

- Appealability of order on demurrer, see **APPEAL AND ERROR**, 1, 2.
- Review of rulings as dependent upon presentation of question in lower court, see **APPEAL AND ERROR**, 3.
- Necessity for statement of facts as to rulings on pleadings, see **APPEAL AND ERROR**, 11.
- Burden of showing error on appeal, see **APPEAL AND ERROR**, 22.
- Presumptions on appeal, as to pleadings, see **APPEAL AND ERROR**, 21, 22.
- Review of rulings involving discretion of court, see **APPEAL AND ERROR**, 23.
- Review of rulings as dependent on prejudicial nature of error, see **APPEAL AND ERROR**, 35.
- As constituting appearance, see **APPEARANCE**.
- In proceedings before railroad commission to change freight rates, see **CARRIERS**, 2.
- Action for breach of contract, see **CONTRACTS**, 4.
- Actions between shareholders and officers or agents of corporation, see **CORPORATIONS**, 1.
- In action to vacate divorce for fraud, see **DIVORCE**, 5.
- In condemnation proceedings, see **EMINENT DOMAIN**, 7.
- In action for loss occasioned by fire, see **FIRES**.
- In actions for fraud, see **FRAUD**, 5, 6.
- On marine insurance policies, see **INSURANCE**, 3.
- Filing complaint as commencement of action, see **LIMITATION OF ACTIONS**, 2.
- In mandamus proceedings, see **MANDAMUS**.
- To enforce mechanics' lien, see **MECHANICS' LIENS**, 13.
- For injuries from defects or obstructions in streets, see **MUNICIPAL CORPORATIONS**, 10.
- Passage of city ordinance, see **MUNICIPAL CORPORATIONS**, 1.
- By or against partners of firms, see **PARTNERSHIP**.
- In action to quiet title, see **QUIETING TITLE**, 4.
- In action for breach of option contract, see **VENDOR AND PURCHASER**, 14-16.
- In action by purchaser to rescind contract for sale of land, see **VENDOR AND PURCHASER**, 8.
- 1. **PLEADING—INCONSISTENT DEFENSES—DEPARTURE.** In an action for an accounting, in which the defense was an account stated, a reply denying the statement of the account and a defense that the account stated was procured by fraud, are inconsistent defenses. *Gerber v. Gerber* 253

PLEADING—CONTINUED.

2. **PLEADING—INCONSISTENT DEFENSES.** In an action for breach of contract to convey land, a denial of the contract as alleged and affirmatively setting up an oral contract of sale and its avoidance, is not inconsistent with an earlier general denial. *Bowers v. Good* 334
3. **PLEADING—ANSWER—DENIALS—SUFFICIENCY—JUDGMENT ON PLEADINGS.** In an action on a note and chattel mortgage, in which the answer admits the execution of the note and mortgage and attempts to set out an affirmative defense which showed that the indebtedness was not paid, a denial that the defendants "owe the sum of \$900, or any other sum or amount whatsoever on account of the note and mortgage above described, or at all," is not sufficient as a denial to put plaintiff upon proof or prevent a judgment for plaintiff on the pleadings. *Mendenhall v. Davis*..... 169
4. **PLEADING—SET-OFF AND COUNTERCLAIM.** An instruction allowing an offset is properly refused when it was not pleaded. *Jameson v. Kempton* 106
5. **PLEADING—AMENDMENT—AFTER TRIAL—DISCRETION.** It is discretionary to refuse to allow an amendment of the complaint, after the defense of an account stated had been tried out, where it would have necessitated a retrial on new issues, with a shifting of the burden of proof. *Gerber v. Gerber*..... 253

POLICE POWER:

Requiring diploma from applicants for license to practice dentistry as unreasonable exercise of police power, see **CONSTITUTIONAL LAW**, 4.

Of municipality, see **MUNICIPAL CORPORATIONS**, 6, 7.

POLICY:

Of accident indemnity insurance, see **INDEMNITY**, 1.

Of marine insurance, see **INSURANCE**.

POSSESSION:

See **ADVERSE POSSESSION**.

Restoration of possession in suit to quiet title, see **QUIETING TITLE**, 2, 5.

POWERS:

Of railroad commission to fix freight rates, see **CARRIERS**, 2.

Power of attorney, see **PRINCIPAL AND AGENT**, 3.

Of railroad commission to order track connections, see **RAILROADS**.

PRACTICE:

See **APPEAL AND ERROR**; **APPEARANCE**; **CERTIORARI**; **CRIMINAL LAW**; **DIVORCE**; **JUDGMENT**; **JURY**; **PLEADING**; **TRIAL**.

Condemnation proceedings, see **EMINENT DOMAIN**.

PREFERENCES:

Preferring creditors, see FRAUDULENT CONVEYANCES.

PREJUDICE:

Ground for reversal in civil actions, see APPEAL AND ERROR, 35-50.

Ground for reversal in criminal prosecution, see CRIMINAL LAW, 12-14.

PRESENTMENT:

Of claim against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 6.

Of claim against municipality, see MUNICIPAL CORPORATIONS, 12.

PRESUMPTIONS:

On appeal, see APPEAL AND ERROR, 13, 21, 22, 29.

As to negligence of carrier in transporting live stock, see CARRIERS, 6.

Negligence in carriage of passengers, see CARRIERS, 18, 19.

Employment of competent coservant, see MASTER AND SERVANT, 6, 10.

PRINCIPAL AND AGENT:

See BROKERS.

Representation of corporation by agent, see CORPORATIONS, 8.

False representations of agent as to price of land, see FRAUD, 1, 4, 5, 7.

Authority of agent to modify marine insurance policy by parol, see INSURANCE, 1.

Fraud of agent as ground for rescission of contract, see VENDOR AND PURCHASER, 1, 2.

1. PRINCIPAL AND AGENT—FRAUD OF SUBAGENT—VENDOR AND PURCHASER. The owner of lots is responsible for fraudulent representations of a subagent employed by the firm who had a contract with the owner to sell the addition, where the owner was the beneficiary of the transaction. *Nelson v. Title Trust Co.* 258
2. PRINCIPAL AND AGENT—LIABILITY OF AGENT TO PRINCIPAL—CONTROL OF ATTORNEY—ATTORNEY AND CLIENT. One acting as agent for a mortgagee in employing an attorney to foreclose a chattel mortgage cannot, after completion of the foreclosure, direct that the attorney withhold the sheriff's bill of sale from the mortgagee after she had bid in the property and paid the attorney his fees; since the mortgagee was the real client and entitled to the bill of sale. *Filion v. Stewart* 682
3. PRINCIPAL AND AGENT—POWER OF ATTORNEY—CONSTRUCTION. A power of attorney to convey any land of the grantors, excepting a farm occupied by them in Green River Valley, authorizes the attorney to convey a lot in the Green River Valley that had never been occupied by the grantors. *Cummings v. Dolan*..... 496

PRINCIPAL AND AGENT—CONTINUED.

4. **PRINCIPAL AND AGENT—DISCLOSED AGENCY—LIABILITY OF AGENT TO THIRD PARTY.** A real estate agent signing a contract to sell land on behalf of the owner, and transacting all the business as agent, is not liable for his principal's default on failing to convey a good title, where none of his acts were inconsistent with the relation of agency. *Davis v. Lee*..... 330
5. **PRINCIPAL AND AGENT—SALES BY AGENT—WARRANTY—AUTHORITY OF AGENT—EVIDENCE—SUFFICIENCY—IMPLIED WARRANTY OF TITLE.** An agent had authority to warrant a cargo of coal as free from incumbrances (including an unpaid duty) where it appears that a representative of the company testified that he had absolute authority to dispose of the coal, that he instructed the agent to make the best settlement possible, had wired him that the duty was paid, and the company failed, after opportunity, to show that the representative did not have the authority claimed by him; especially where it had constructive possession, which raises an implication of warranty of title. *North American Commercial Co. v. North American Transportation and Trading Co.* 502
6. **PRINCIPAL AND AGENT—SALES—BROKERS—RATIFICATION OF PURCHASE BY BROKER.** The purchaser of coffee ratifies a purchase made for him by a broker, where, upon being fully informed, he fails to express dissatisfaction, but on the contrary acknowledges receipt of the invoice and corresponds with the vendor respecting non-arrival of the shipment on time. *Ankeny v. Young Bros.*..... 235

PRINCIPAL AND SURETY:

See INDEMNITY.

On sheriff's bonds, see SHERIFFS AND CONSTABLES.

1. **PRINCIPAL AND SURETY—INDEMNITY BONDS—BUILDING CONTRACT—ACTION ON BOND—DEFENSES—PAYMENT BEFORE COMPLETION OF WORK—TERMS OF CONTRACT.** It is no defense to an action on an indemnity bond guaranteeing a building contract, that payment for the work was made before the same was commenced, where no time was mentioned in the contract, and a provision that payment was, in legal contemplation, to be made on completion of the work cannot be read into the contract. *Leienhecker v. Aetna Indemnity Co.* 609
2. **SAME—FRAUD—STIPULATION IN BOND REQUIRING NOTICE OF PAYMENT.** It is a fraud upon the surety company vitiating an indemnity bond guaranteeing a building contract, for the obligee to pay the contractor in full before the work is commenced, without notice to the surety, although the contract mentioned no time for payment, where the bond provided that the obligee shall "retain the last payment and reserve due said principal" until the work is complete and time for filing liens had expired and shall notify the surety in writing before the last payment shall be made or reserve paid. *Leienhecker v. Aetna Indemnity Co.* 609

PRIVATE ROADS:

Rights of way, see EASEMENTS.

PROBATE:

Administration of estates of decedents, see EXECUTORS AND ADMINISTRATORS.

PROCESS:

On appeal, see APPEAL AND ERROR, 9.

Waiver of error by appearance, see APPEAL AND ERROR, 20.

Condemnation proceedings, see EMINENT DOMAIN, 6.

Personal service in foreclosure of tax lien, see TAXATION, 2.

PROMISSORY NOTES:

See BILLS AND NOTES.

PROPERTY:

Dedication to public use, see DEDICATION.

Taking for public use, see EMINENT DOMAIN.

PROSECUTING ATTORNEYS:

Review of instructions to grand jury limiting duties of prosecutor, see CERTIORARI, 1, 2.

PROXIMATE CAUSE:

Negligence of carrier causing death of live stock, see CARRIERS, 5.

Of injury to servant, see MASTER AND SERVANT, 5.

PUBLIC IMPROVEMENTS:

By cities, see MUNICIPAL CORPORATIONS, 3-5.

PUBLIC LANDS:

Acquisition by adverse possession, see ADVERSE POSSESSION, 1, 3.

Indian lands, see INDIANS.

Character of estate in lands patented after enactment of community property law, see JOINT TENANCY.

Assessment and sale of leasehold interest in state lands, see MUNICIPAL CORPORATIONS, 3-5.

Taxation of property taken by state under eminent domain proceedings, see TAXATION, 1.

PUBLIC USE:

Dedication of property, see DEDICATION.

Taking property for public use, see EMINENT DOMAIN.

QUALITY:

Evidence of warranty as to quality of goods sold, see SALES, 4.

QUESTION FOR JURY:

- In action for injuries to passenger, see **CARRIERS**, 21, 22.
 Improper and unsafe method of loading logs on sled, see **EVIDENCE**, 5.
 Authority of agents to modify marine insurance policy by parole, see **INSURANCE**, 1.
 In action for injuries to servant, see **MASTER AND SERVANT**, 8, 13.
 Sale made by sample, see **SALES**, 1.
 Negligence of driver of automobile struck by car, see **STREET RAILROADS**, 3.
 Negligence of motorman in colliding with automobile, see **STREET RAILROADS**, 2.
 In civil actions in general, see **TRIAL**, 7, 8.

QUIETING TITLE:

- Jurisdiction to quiet title and set aside tax deed of other county, see **COURTS**.
 Estoppel of co-owner to set up defense of laches, see **ESTOPPEL**, 2.
 Judgment on merits, see **JUDGMENT**, 6.
1. **QUIETING TITLE—CLOUD—WHAT CONSTITUTES.** Hostile assertion of title to a parcel of land, formerly an alley which had been vacated, by the former owner of abutting lots, constitutes a cloud on the title which may be quieted under Bal. Code, § 5521. *Norton v. Gross* 341
 2. **QUIETING TITLE—RELIEF—RECOVERY OF POSSESSION—EJECTMENT.** Where a plaintiff, out of possession, brings an action to cancel her deeds to a grantee in possession and to quiet her title to the property conveyed, the action is essentially one to recover possession, in which the court may quiet title and award possession. *Garvey v. Garvey* 516
 3. **QUIETING TITLE—DEEDS INTENDED AS MORTGAGES—ISSUES—JUDGMENT—UNNECESSARY PARTIES.** Where the owners of premises had successively given two deeds thereof to secure debts to different parties, an action brought by the first grantee against the second grantee to remove the cloud of the latter's deed is properly dismissed, where it is shown that both deeds were intended as mortgages; and it is immaterial that the mortgagors were not parties to the action. *Clambey v. Copland* 580
 4. **QUIETING TITLE—PLEADING—DEFENSES NOT PLEADED—ISSUES—JUDGMENT—EFFECT.** Under Bal. Code, § 5508, requiring the defendant in an action to quiet title to set up his claim, and § 5509, excluding evidence of any estate not pleaded in the answer, the offer in evidence at the trial of a deed not pleaded, nor recorded when the suit was commenced, comes too late, and the court may refuse to allow an amendment; and judgment quieting title has the effect to vacate the deed recorded after action brought. *Garvey v. Garvey* 516

QUIETING TITLE—CONTINUED.

5. **QUIETING TITLE—JUDGMENT—FORM—RESTORATION OF POSSESSION TO DEFENDANTS AND OF PURCHASE MONEY TO PLAINTIFF.** In an action to quiet title to Indian lands, in the possession of the plaintiff since 1900 under a void deed, judgment setting aside the deed and restoring possession should require repayment to the plaintiff of the purchase price paid to the Indians, together with a certain attorney's fee due him which was part of the purchase price, and had since outlawed, with interest from the date of payment, and any sums paid for taxes, less any amounts or things of value received by the plaintiff for the sale, use or lease of the lands. *Starr v. Long Jim* 138

QUITCLAIM:

Effect of and execution of quitclaim deed to pass title, see **VENDOR AND PURCHASER**, 3, 4.

RAILROAD COMMISSION:

Regulation of freight rates, see **CARRIERS**, 1, 2.

Power to compel trackage connections, see **RAILROADS**.

RAILROADS:

Carriage of goods and passengers, see **CARRIERS**.

Injuries to passengers, see **CARRIERS**, 18, 21, 25.

Inadequate or excessive damages for personal injuries, see **DAMAGES**, 4.

Injuries to employees from obstructions or erections on or near tracks, see **MASTER AND SERVANT**, 5, 8.

Injuries to persons on or near street railway tracks, see **STREET RAILROADS**.

1. **RAILROADS—REGULATION—RAILROAD COMMISSION—ORDERS—JUDICIAL REVIEW—CONSTITUTIONAL LAW—DUE PROCESS OF LAW.** The act of 1907, p. 538, § 3, conferring authority upon the state railroad commission to compel trackage connections between railroads and to determine who should pay the cost of the same, is not an interference with property, amounting to the taking of the same without due process of law; since the act provides for a review of the order of the commission by the superior court. *State ex rel. Oregon R. & Navigation Co. v. Railroad Commission*..... 17
2. **SAME—PROCEDURE—APPEAL—REVIEW—EVIDENCE.** It is not material that the act requires a review of the order in the superior court upon the testimony taken before the railroad commission; since the act provides a complete remedy if the commission refuses to accept competent evidence, by a reversal for error with instructions to receive the evidence proffered and rejected. *State ex rel. Oregon R. & Navigation Co. v. Railroad Commission*..... 17
3. **SAME—WITNESS—ATTENDANCE.** The procedure before the commission is not objectionable for lack of due process because the attendance of witnesses cannot be compelled, since attendance may be com-

RAILROADS—CONTINUED.

- pelled through an order of the superior court, under section 4, Laws 1907, p. 544. *State ex rel. Oregon R. & Navigation Co. v. Railroad Commission* 17
4. SAME—PERJURY. Nor is it objectionable for want of penalties for perjury, since the general law of perjury applies. *State ex rel. Oregon R. & Navigation Co. v. Railroad Commission*..... 17
5. SAME—PROCEDURE—COMMISSION AS ACCUSERS. Laws 1907, ch. 226, p. 536, authorizing the state railroad commission to hear and determine complaints against railroad companies as a mediatory court on matters of railroad regulation is not objectionable in that the commission may be the accuser and file the complaint against the companies, there being no presumption of partiality or unfairness from such fact. *State ex rel. Oregon R. & Navigation Co. v. Railroad Commission* 17
6. SAME—NUMBER OF WITNESSES. The act is not objectionable in that it empowers the commission to limit the number of witnesses. *State ex rel. Oregon R. & Navigation Co. v. Railroad Commission* 17
7. SAME—CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWERS. The act of 1907, p. 530, § 3, conferring authority upon the state railroad commission to order trackage connections between railroads is not an unlawful delegation of legislative power on the theory that the legislature has established no standards or principles for the guidance of the commission, since the act provides in many places that the enforcement of its provisions shall be just, fair and reasonable. *State ex rel. Oregon R. & Navigation Co. v. Railroad Commission* 17
8. SAME—CONSTITUTIONAL LAW—GOVERNMENTAL POWERS—COMMINGLING—RESTRICTIONS. The railroad commission act creating a reglative railroad commission with executive and administrative duties may also confer on the commission judicial powers as a mediatory court, since the constitutional division of governmental powers into three separate departments applies only in a limited sense, and does not restrict one set of officers to one department exclusively. *State ex rel. Oregon R. & Navigation Co. v. Railroad Commission*..... 17
9. RAILROADS—REGULATION—RAILROAD COMMISSION—REVIEW OF ORDERS—CERTIORARI—RECORD—CERTIFYING EVIDENCE. Upon certiorari to review an order of the state railroad commission, the evidence used in other cases, under stipulation, may be certified by reference thereto in the return to the writ, it not being objected that it was not certified, as the form of certification is not material. *State ex rel. Oregon R. & Navigation Co. v. Railroad Commission*..... 17
10. SAME—TRACAGE CONNECTIONS—POWER OF RAILWAY COMMISSION. Under Laws 1907, p. 538, § 3, vesting the state railroad commission with power to make regulations concerning the sufficiency of the

RAILROADS—CONTINUED.

trackage, railroad connections, siding, etc., and to order additional trackage or siding constructed, the commission has power to order physical track connections between different railroads. *State ex rel. Oregon R. & Navigation Co. v. Railroad Commission*..... 17

RAPE:

Harmless error in admission of evidence, see **CRIMINAL LAW**, 14.

1. **RAPE—EVIDENCE—CONDUCT AT OTHER TIMES.** In a prosecution for statutory rape, evidence is admissible of the prosecuting witness' conversations with accused at other times than the one upon which the state elected to rely. *State v. Simmons*..... 132
2. **RAPE—EVIDENCE—COMPLAINT MADE BY PROSECUTRIX—CORROBORATION CONNECTING DEFENDANT WITH CRIME.** Evidence of complaint made by the prosecutrix, soon after a rape, is admissible only as corroborative proof that the complainant was raped, and it is not such corroboration as "tends to convict the defendant of the commission of the offense," within the requirement of Laws 1907, p. 396; since some substantial fact or circumstance independent of the statement of the prosecutrix is required. *State v. Stewart*..... 61
3. **SAME—INSTRUCTIONS.** An instruction which singles out and makes prominent the complaint made by the prosecutrix, without qualification or explanation of its character as evidence, as a "corroborating circumstance, tending to support her testimony . . . relating to the alleged crime of rape having been committed upon her," is prejudicial error tending to mislead the jury into finding therefrom corroboration tending to connect the defendant with the crime. *State v. Stewart* 61
4. **RAPE—NEW TRIAL—AFFIDAVITS—SUFFICIENCY.** It is not a ground for a new trial in a prosecution for rape that it is shown by affidavits that the ordinary period of gestation had elapsed since the act and the prosecutrix had not yet been delivered of her child. *State v. Simmons* 132

RATE:

Of interest, see **INTEREST**.

Of speed of street car, see **STREET RAILROADS**, 1.

RATIFICATION:

Of act of corporate officer or agent, see **CORPORATIONS**, 6.

Act of married women, see **HUSBAND AND WIFE**, 2.

Of act of agent, see **PRINCIPAL AND AGENT**, 6.

REAL ESTATE AGENTS:

See **BROKERS**.

REAL PROPERTY:

Title to real estate acquired by national bank, see **BANKS AND BANKING**, 2.

Effect of laches on recovery of real property held under void deeds, see **EQUITY**, 2.

Conveyance, see **VENDOR AND PURCHASER**.

REBATE:

Of customs duties, see **CUSTOMS DUTIES**.

RECITALS:

In judgment authorizing judgment on merits, see **JUDGMENT**, 6.

RECORDS:

Transcript on appeal or writ of error, see **APPEAL AND ERROR**, 11-15.

Effect of failure to enter order of probate, see **EXECUTORS AND ADMINISTRATORS**, 7.

Certifying evidence on certiorari to review order of railroad commission, see **RAILROADS**, 9.

Notice to purchaser of easement in absence of record, see **VENDOR AND PURCHASER**, 13.

1. **RECORDS—ASSIGNMENTS—CONSTRUCTIVE NOTICE.** There is no law authorizing the recording of an assignment of a claim, and the record thereof is not constructive notice to the debtor. *Dial v. Inland Logging Co.* 81

REDEMPTION:

Purchase of certificate by co-owner as redemption from tax sale, see **TENANCY IN COMMON**, 1.

REFORMATION OF INSTRUMENTS:

1. **REFORMATION OF INSTRUMENTS—MUTUAL MISTAKE—EVIDENCE—SUFFICIENCY.** The evidence clearly shows a mutual mistake, warranting the reformation of a deed to one and one-half lots, so as to include a parcel of land formerly constituting an alley between the lots, which had been vacated, where it appears that the vendors pointed out the lines of the entire tract as one parcel and represented that it abutted on both streets, and it was occupied as one tract for residence purposes at the time. *Norton v. Gross*..... 341

REGULATION:

Of railroads, see **RAILROADS**.

REJECTION:

Reasons for rejection of claim against city, see **MUNICIPAL CORPORATIONS**, 13.

RELATION:

Evidence of, see **MASTER AND SERVANT**, 1-4.

RELEASE:

Liability of carrier for injury to goods, see **CARRIERS**, 3.
Liability as surety, see **PRINCIPAL AND SURETY**, 2.

RELIANCE:

On false representations, see **FRAUD**, 1, 3.

RELIEF:

In action to quiet title, see **QUIETING TITLE**.

REMISSION:

Of excess of judgment, see **APPEAL AND ERROR**, 51.

REPEAL:

Implied repeal of laws regulating freight rates, see **CARRIERS**, 2.

REPLEVIN:

Right to replevin for logs taken from unlawful boom, see **LOGS AND LOGGING**.
Transfer of property acquired under conditional sale, see **SALES**, 8.

REPRESENTATIONS:

False representations, see **FRAUD**.

REPUDIATION:

Of trust as affecting running of statute, see **LIMITATION OF ACTIONS**, 1.

REPUTATION:

Of deceased as affecting claim of self-defense in homicide, see **HOMICIDE**, 5.

REQUESTS:

For instructions in criminal prosecutions, see **CRIMINAL LAW**, 5, 10.
For instructions in civil actions, see **TRIAL**, 12-15.

RESCISSION:

Cancellation of written instrument, see **CANCELLATION OF INSTRUMENTS**.
Of contract, see **CONTRACTS**, 2.
Of contract for sale of land, see **VENDOR AND PURCHASER**, 1, 2, 5-7.

RESERVATION:

Indian reservations, see **INDIANS**.

RESIDENCE:

Statement of claimant's residence in claim against city, see **MUNICIPAL CORPORATIONS**, 11.

RES JUDICATA:

See **JUDGMENT**, 7.

REVENUE:

See CUSTOMS DUTIES; TAXATION.

REVERSION:

Of title to vacated alley, see MUNICIPAL CORPORATIONS, 8.

REVIEW:

See HABEAS CORPUS.

By higher court on appeal for errors or irregularities, see APPEAL AND ERROR.

Statutory writ of review, see CERTIORARI.

In criminal prosecution, see CRIMINAL LAW, 12-14.

In condemnation proceedings, see EMINENT DOMAIN, 9, 10, 13.

REVOCATION:

Of will, see WILLS, 2.

RIGHT OF WAY:

Easements, see EASEMENTS.

Of street railway, see STREET RAILROADS, 2.

RULES:

Of statutory construction, see STATUTES, 2.

SAFE PLACE TO WORK:

See MASTER AND SERVANT, 5, 8, 9, 11-13.

SALES:

By broker, see BROKERS; PRINCIPAL AND AGENT.

Of material to himself by manager of corporation, see CORPORATIONS, 6.

Recital in bill of sale of assets as estoppel against claims for wages due stockholders, see CORPORATIONS, 7.

On execution, see EXECUTION.

Reliance on false representations inducing sale of land, see FRAUD, 1, 4, 5, 7.

Memoranda of sale sufficient to satisfy statute of frauds, see FRAUDS, STATUTE OF, 2.

Of real property, see VENDOR AND PURCHASER.

1. SALES—BY SAMPLE—QUESTION FOR JURY. A sale of coffee is not made by sample, as a matter of law, although samples were exhibited, where it appears that the sale was of two particular identified lots, delivered to the purchaser's agent and by him put aboard ship; it being a mixed question of law and fact for the jury. *Ankeny v. Young Bros.* 235
2. SALES—DELIVERY AND ACCEPTANCE—DELIVERY EX-WAREHOUSE—CUSTOM OF TRADERS. There is a delivery and acceptance of coffee sold, where a broker was constituted the purchaser's agent to buy the coffee, and purchased the same to be shipped by steamer, and

SALES—CONTINUED.

the custom was to make the delivery at the warehouse at the point of shipment, which was done, and proper warehouse orders were delivered to the broker, who caused the coffee to be loaded aboard ship; the purchaser being bound to take notice of the custom, and the delivery to the broker being delivery to him. *Ankeny v. Young Bros.* 235

3. **SALES—DELIVERY—LOSS OF GOODS IN TRANSIT.** After delivery and acceptance of goods sold, at the point of shipment, the vendee must suffer the loss of goods in transit. *Ankeny v. Young Bros.*..... 235

4. **SALES—QUALITY—EVIDENCE—SUFFICIENCY.** Findings that shingles were sold as of "Star A Star" grade, are sustained where the parties contradicted each other, but they were branded, shipped and billed as such, and the price paid was the then ruling market price for that grade. *Springfield Shingle Co. v. Edgecomb Mill Co.*..... 620

5. **SALES—DAMAGES—CONDITION BROKEN—QUALITY—CAVEAT EMPTOR.** The principle of caveat emptor does not apply where shingles are sold as "Star A Star," a grade well known to the trade and by custom conforming to certain specifications; and if not up to grade, the vendee may recover his damages, as for condition broken, although he inspected or had opportunity to inspect them before the sale. *Springfield Shingle Co. v. Edgecomb Mill Co.* 620

6. **SALES—BREACH—FAILURE TO DELIVER—MEASURE OF DAMAGES—EVIDENCE—ADMISSIBILITY.** In an action for damages for the breach of a contract to deliver telegraph poles, evidence that plaintiff could have procured the poles from other dealers is immaterial, as it does not affect the measure of damages, which is the difference between their contract price and their market value. *Carney v. Vogel*... 571

7. **SALES—WARRANTY AGAINST INCUMBRANCES—PAYMENT OF DUTY—FAILURE OF VENDEE TO GIVE NOTICE.** Where the purchaser of foreign coal was not notified within ten days of the reliquidation of duty on the coal, and the statute made the decision of the collector final unless appeal was taken in ten days, the purchaser's failure to notify the vendor of the lien for the duty within time to enable the vendor to take an appeal and contest the duty will not deprive the purchaser of his right to recover the duty which he was required by the government to pay, under the vendor's warranty that the coal was free from incumbrances. *North American Commercial Co. v. North American Transportation and Trading Co.*..... 502

8. **SALES—CONDITIONAL SALES—TRANSFER WHILE VENDEE IN ARREARS—RIGHTS OF SUBSEQUENT PURCHASERS—DEFAULT—WAIVER—REPLEVIN—TENDER AFTER SUIT BROUGHT.** The purchaser of a cash register, from a conditional vendee who was in arrears at the time, takes the right and title of such vendee, where no default had been declared and the contract did not stipulate against assignment, and he may tender the balance due, with interest and costs, after suit brought, and thereby defeat an action of replevin; since the provision that the title is to remain in the vendor until the last installment is paid,

SALES—CONTINUED.

with the right to retake the property, is for the benefit of the vendor, and is waived where time is not made of the essence and payments are accepted after maturity and no default declared. *National Cash Register Co. v. Wapples*..... 657

SAMPLE:

Sale by sample, see **SALES**, 1.

SEALS:

As importing consideration for deed, see **DEEDS**, 1.

SELF-DEFENSE:

Instructions, see **CRIMINAL LAW**, 6.

Defenses in prosecution for homicide, see **HOMICIDE**.

SEPARATE ESTATE:

Of married women, see **HUSBAND AND WIFE**, 1.

SERVANTS:

See **MASTER AND SERVANT**.

SET-OFF AND COUNTERCLAIM:

Damages for breach of contract by death of employee, see **CONTRACTS**, 4.

Offset of wages due officer against material purchased from corporation, see **CORPORATIONS**, 5.

Of rents and profits pending appeal against allowances to respondent in divorce proceeding, see **COSTS**.

Offset of damages for breach of contract in action by executors against maker of note, see **EXECUTORS AND ADMINISTRATORS**, 5, 6.

In action for deceit of agent in representing price of land, see **FRAUD**, 4.

Pleading matter of set-off or counterclaim, see **PLEADING**, 4.

SETTLEMENT:

See **COMPROMISE AND SETTLEMENT; PAYMENT**.

SHERIFFS AND CONSTABLES:

1. **SHERIFFS—NEGLECT OF DUTY—ESCAPE OF PRISONERS—OFFICIAL BONDS—LIABILITY TO PERSONS ENTITLED TO REWARD.** A sheriff is not liable on his official bond to parties entitled to a reward for the capture of criminals, turned over to him, for damages suffered by the escape of the prisoners, under the conditions of his official bond to "well, truly, and faithfully perform all of his duties as sheriff," and of the statute giving a right of action on the bond in favor of all persons injured or aggrieved by his wrongful act or default; since the duty to keep the prisoners is not direct, or to the plaintiffs, but

SHERIFFS AND CONSTABLES—CONTINUED.

to the public, and damages recoverable on the bond must be measured by the wrongful act itself and not by loss of profits anticipated under an independent contract between third parties. *McPhee v. United States Fidelity and Guaranty Co.*..... 154

SHIPPING:

Action on policy of marine insurance, see **INSURANCE**.

Fellow servants in shipping, see **MASTER AND SERVANT**, 6, 10, 14, 15.

Master's liability for injuries to servant from unsafe appliances and places to work, see **MASTER AND SERVANT**, 4.

SOLVENCY:

Test of solvency, see **FRAUD**, 8.

False representations as to solvency of corporation, see **FRAUD**, 2, 3, 6, 8-12.

SPECIFIC PERFORMANCE:

Of contract to purchase real property, see **VENDOR AND PURCHASER**, 12.

1. **SPECIFIC PERFORMANCE—RELIEF—ACTIONS—FORM—VENDOR AND PURCHASER—RESCISSION OR DAMAGES.** An action to compel the vendor to carry out his contract to convey certain lots as pointed out, or in the alternative for a rescission and return of purchase money, should not be dismissed for failure of proof where the plaintiff's evidence shows that he is entitled to damages or relief of any kind. *Nelson v. Title Trust Co.*..... 258

STATEMENT OF FACTS:

See **APPEAL AND ERROR**, 11, 15.

STATUTES:

See **CUSTOMS DUTIES; FRAUDS, STATUTE OF.**

Control and regulation of carriers, see **CARRIERS**, 2.

Law prescribing imprisonment for fraud in incurring innkeeper's bill, see **CONSTITUTIONAL LAW**, 1-3.

Assessments for construction and maintenance of drains, see **DRAINS**.

Construction of statute relating to parties defendant in condemnation proceedings, see **EMINENT DOMAIN**, 5.

Statutes of limitation, see **LIMITATION OF ACTIONS**.

Public improvements, see **MUNICIPAL CORPORATIONS**, 3-5.

Substantial compliance with provision for filing certificate of firm name, see **PARTNERSHIP**.

Construction of law providing for revocation of will by marriage, see **WILLS**, 2.

1. **STATUTES—CONSTRUCTION—AMBIGUITY—COUNTIES — BOUNDARIES—EXTRINSIC EVIDENCE—ADMISSIBILITY—SUFFICIENCY.** Where the statutory description of county boundaries is ambiguous and doubtful, it is admissible to show the contemporaneous construction placed thereon by the assumption and continuous exercise of jurisdiction

STATUTES—CONTINUED.

- over the territory by the officers of one county, in relation to roads, road districts, election precincts, school districts, and the candidacy for county offices and the voting of inhabitants of the territory, and the return and assessment of its property for taxation; evidence of such long continued, undisputed control being sufficient to show that the territory was included in such county. *Puget Sound National Bank v. Fisher*..... 246
2. **STATUTES—RULE OF CONSTRUCTION.** In construing a statute, the courts must look to the old law, the mischief and the remedy. *State v. Stewart* 61
3. **STATUTES—AMENDMENTS—TIME OF TAKING EFFECT—EMERGENCY CLAUSE.** Where an act passed two years previously is amended in various particulars, and by adding another section which provided that "an emergency exists and this act shall take effect immediately," the emergency clause has reference to the amendatory act and not to the original act, which accordingly takes effect upon approval. *State ex rel. Oregon R. & Navigation Co. v. Railroad Commission* 17

STAY:

Pending appeal or writ of error, see **APPEAL AND ERROR**, 10.

STOCKHOLDERS:

Action against corporation, see **CORPORATIONS**.

STREET RAILROADS:

- Injuries to passengers, see **CARRIERS**, 15-17, 19, 20, 22, 26.
- Inadequate and excessive damages, see **DAMAGES**, 6.
- Inadequate or excessive damages for death of passenger, see **DEATH**.
1. **STREET RAILWAYS—NEGLIGENCE—EXCEEDING SPEED LIMIT.** It is negligence *per se* for a street car to exceed the speed limit. *Wilson v. Puget Sound Electric R.*..... 522
2. **SAME—STREETS—RIGHT OF WAY—NEGLIGENCE—QUESTION FOR JURY.** In such a case, the street car does not have the right of way, as a matter of law, and it is for the jury to determine whether the motorman was guilty of negligence in not seeing the automobile in time to avoid an accident. *Baldie v. Tacoma R. & Power Co.*... 75
3. **STREET RAILWAYS—COLLISION WITH AUTOMOBILE—DRIVING ON TRACK—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.** It is not contributory negligence, as a matter of law, for the driver of an automobile, who was run into from behind by a street car, to drive his machine on the street car tracks, without looking back, where it appears that he had a red rear light, the night was dark and foggy, and there was danger of striking people on the crossings, and one of the cross streets was torn out and could be crossed only over the street car tracks, and there was evidence that the street car was running at a dangerous rate of speed and sounding no alarm at the time of the collision. *Baldie v. Tacoma R. & Power Co.*... 75

STREETS:

Dedication, see **DEDICATION**.

SUBAGENTS:

Liability for fraud of, see **PRINCIPAL AND AGENT**, 1.

SUBCONTRACTORS:

See **MECHANICS' LIENS**, 3.

SUPERSEDEAS:

On appeal or writ of error, see **APPEAL AND ERROR**, 10.

Disposition of rents and profits pending appeal and allowance of costs in action for divorce, see **COSTS**.

TAXATION:

See **CUSTOMS DUTIES**.

Payment of taxes to sustain adverse possession, see **ADVERSE POSSESSION**, 4-6.

Tax deed as color of title, see **ADVERSE POSSESSION**, 4.

By drainage districts, see **DRAINS**.

Power of state to provide for condemnation discharging land from lien of unpaid taxes, see **EMINENT DOMAIN**, 1.

Acceptance of repayment of tax as estoppel to assert adverse possession, see **ESTOPPEL**, 1.

Assessments for municipal improvements, see **MUNICIPAL CORPORATIONS**, 3-5.

Payment of tax by co-owner, see **TENANCY IN COMMON**, 2.

Effect of purchase of tax certificate by co-owner, see **TENANCY IN COMMON**, 1.

1. **TAXATION—VESTED RIGHTS—PUBLIC PROPERTY—DISCHARGE OF LIEN BY EMINENT DOMAIN PROCEEDINGS.** As there can be no vested right to enforce the collection of taxes, and as public property is not subject to taxation, a county cannot enforce a tax lien against property after it is relieved therefrom by the state's taking the same over as public property under eminent domain proceedings. *Gasaway v. Seattle* 444
2. **TAXATION—FORECLOSURE—PROCESS—PERSONAL SERVICE OF SUMMONS—WHEN NECESSARY—VACATION OF VOID JUDGMENT.** A tax foreclosure judgment, secured by a private individual by publication of summons without personal service of the summons on the owner to whom the land was assessed, and who lived on the premises, is void, and is properly vacated in an action to set it aside. *Rust v. Kennedy* 472
3. **TAXATION—TAX TITLE—ACTION TO SET ASIDE—CONDITIONS PRECEDENT—TENDER OF TAX.** An action to set aside a tax deed and quiet title is properly nonsuited where it is not alleged or proved that the plaintiff tendered to the defendant holders of the tax title all taxes,

TAXATION—CONTINUED.

penalties, interest, and costs, paid by them at the tax sale, the same being made a condition precedent to action by Bal. Code, § 5679.
Nunn v. Stewart 513

TENANCY IN COMMON:

1. **TENANCY IN COMMON—TAXATION—REDEMPTION—PURCHASE OF CERTIFICATE BY CO-OWNER.** The purchase of a tax certificate by a joint owner of land, has the effect of redemption from the tax sale, and inures to the benefit of the co-owners. *Stone v. Marshall*..... 375
2. **SAME—PAYMENT OF TAX BY CO-OWNER—LIEN.** A co-owner, by payment of taxes against the entire estate, acquires a lien for a just proportion of the taxes paid, but cannot acquire a tax title to the exclusion of co-owners. *Stone v. Marshall*..... 375

TENDER:

By purchaser from conditional vendee of balance due after suit, see **SALES**, 8.

Of taxes due as condition precedent to attack on tax title, see **TAXATION**, 3.

Necessity of tendering performance on breach of option contract, see **VENDOR AND PURCHASER**, 14.

1. **TENDER—INTEREST.** After sufficient tender of an amount due on an indemnity contract, interest does not run on the sum due. *Puget Sound Imp. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co.* 124

THEORY OF THE CASE:

As determining scope and extent of review, see **APPEAL AND ERROR**, 17.

TICKETS:

Carriage of passengers, see **CARRIERS**, 11-14.

TIMBER:

Cutting and floating of logs, see **LOGS AND LOGGING**.

TIME:

Payment of taxes during period of adverse possession, see **ADVERSE POSSESSION**, 6.

For motion to dismiss appeal, see **APPEAL AND ERROR**, 16.

Failure to complete contract of sale within authorized time, see **BROKERS**, 3.

Reasonable time for bringing action for rescission of sale of lands, see **CANCELLATION OF INSTRUMENTS**, 5.

For application to vacate judgment, see **JUDGMENT**, 5.

For presentation of claim against city, see **MUNICIPAL CORPORATIONS**, 12.

Of taking effect of amendment containing emergency clause, see **STATUTES**, 3.

TITLE:

- Acquiring title to real estate by national bank, see **BANKS AND BANKING**, 2.
- Color of title, see **ADVERSE POSSESSION**.
- Estoppel to assert title, see **ESTOPPEL**, 1.
- Indian lands, see **INDIANS**.
- Of plaintiff in replevin, see **LOGS AND LOGGING**.
- Of vacated alley, see **MUNICIPAL CORPORATIONS**, 8.
- Warranty of goods sold by agent, and implied warranty of title, see **PRINCIPAL AND AGENT**, 5.
- Removal of cloud, see **QUIETING TITLE**.
- Contracts creating conditions on transfer of title, see **SALES**, 8.
- Delivery and acceptance as passing title, see **SALES**, 3.
- Sufficiency of title of vendor of land, see **VENDOR AND PURCHASER**, 9, 10, 12.
- Defect as ground for rescission of sale of land, see **VENDOR AND PURCHASER**, 6-9.

TORTS:

- See **FRAUD**.
- Of bank officers, see **BANKS AND BANKING**, 1.
- In carriage of passengers, see **CARRIERS**.
- Measure of damages, see **DAMAGES**, 1, 2.
- Damages, inadequate or excessive, see **DAMAGES**, 3-6.
- Damages for causing death, see **DEATH**.
- Injuries from defective or dangerous condition of demised premises, see **LANDLORD AND TENANT**.
- Persons engaged in driving and floating logs, see **LOGS AND LOGGING**.
- Of cities, see **MUNICIPAL CORPORATIONS**, 9-13.
- Of agent, see **PRINCIPAL AND AGENT**, 1.
- Injuries caused by operation of street cars, see **STREET RAILROADS**.

TREATIES:

- Indian treaties, see **INDIANS**.

TRIAL:

- Appealability of order of dismissal, see **APPEAL AND ERROR**, 1.
- Necessity for exceptions or objections in lower court, see **APPEAL AND ERROR**, 3-8.
- Necessity for including findings in transcript, see **APPEAL AND ERROR**, 12.
- Presumption on appeal, see **APPEAL AND ERROR**, 21, 22, 29.
- Findings as conclusions of law, see **APPEAL AND ERROR**, 28.
- Review of discretionary action, see **APPEAL AND ERROR**, 23.
- Review of findings in trial by court, see **APPEAL AND ERROR**, 27-34.
- Review of rulings as dependent on prejudicial nature of error, see **APPEAL AND ERROR**, 35-50.
- Review of rulings as dependent upon presentation of objection in lower court, see **APPEAL AND ERROR**, 3-8.
- Review of rulings as dependent on presentation of same by record, see **APPEAL AND ERROR**, 11-15.

TRIAL—CONTINUED.

Scope and extent of review as dependent on theory of case, see **APPEAL AND ERROR**, 17.

Appearance, see **APPEARANCE**.

Instructions in action for injuries to passengers, see **CARRIERS**, 26.

Review of instructions to grand jury at instance of prosecuting attorney, see **CERTIORARI**, 1, 2.

In criminal prosecutions, see **CRIMINAL LAW**.

Condemnation proceedings, see **EMINENT DOMAIN**.

Instructions as to comparison of handwriting by jury, see **EVIDENCE**, 7.

Instructions in action for deceit in representing solvency of corporation, see **FRAUD**, 11, 12.

Instructions in criminal prosecutions, see **HOMICIDE**, 8-12.

Competency of and challenge to jurors, see **JURY**.

Motions and grounds for new trial, see **NEW TRIAL**.

Attendance and examination of witnesses, see **WITNESSES**.

1. **TRIAL—WITNESSES—LIMITING NUMBER—PARTIES—CORPORATIONS—STOCKHOLDERS.** A stockholder of a defendant corporation comes within a restriction limiting the number of witnesses upon an issue, and cannot be used as a witness after the limit is reached on the theory that he is a party. *Manhattan Building Co. v. Seattle*... 226
2. **TRIAL—RECEPTION OF EVIDENCE—SPECIFIC OBJECTIONS.** Where the question asked simply required the witness to state what he would do if he should be advised by his counsel in a certain way, an objection that it was "predicated upon facts not in the case," is valueless and insufficient to raise the point that the advice of counsel, or the action of the witness thereon, were irrelevant or inadmissible. *Kisnane v. Conroy* 651
3. **TRIAL—MISCONDUCT OF ATTORNEY—MASTER AND SERVANT—QUESTIONS INDICATING INDEMNITY.** It is not misconduct of counsel, requiring a new trial, for attorney for the plaintiff in a personal injury case to interrogate a juror as to whether he was a solicitor for an indemnity company, where the examination was not for the purpose of informing the jury that the burden of the judgment would fall upon an insurance company. *Hoyt v. Independent Asphalt Paving Co.* 672
4. **TRIAL—MISCONDUCT OF COUNSEL—ARGUMENT TO JURY—HARMLESS ERROR.** It is not ground for reversal that counsel, in argument to the jury, stated that he had been a superior judge, and would not believe a certain witness under oath, where the court upon request at once instructed the jury that the witness had not been impeached and to disregard the statement, and the testimony of the witness related only to an incidental fact, and not to the pivotal question in issue. *Rangenier v. Seattle Electric Co.*..... 401
5. **TRIAL—COMMENTS OF COUNSEL—EVIDENCE—PURPOSES FOR WHICH OFFERED.** Where appellant offered in evidence an exhibit for a speci-

TRIAL—CONTINUED.

- fied purpose without expressly limiting its effect it becomes evidence upon any point in issue to which it is material and relevant; and it is proper to refuse to restrict the argument of opposite counsel thereon. *Kinnane v. Conroy*..... 651
6. TRIAL—MISCONDUCT OF COUNSEL—MASTER AND SERVANT—QUESTIONS SHOWING INSURANCE AGAINST ACCIDENTS. In an action for personal injuries sustained by an employee on a tugboat, it is not such misconduct as to warrant a reversal, for plaintiff's counsel to ask questions tending to show that defendant carried insurance with an insurance company allowing half pay in case of accident to employees, where it was inferable that accident insurance was carried not depending upon defendant's negligence, and where the court instructed the jury that the statements of counsel were not evidence and were not to be considered. *Passage v. Stimson Mill Co.*..... 661
7. TRIAL—PROVINCE OF COURT AND JURY—NONSUIT. While courts may not determine the weight of the evidence, if there is no evidence of a fact essential to sustain liability, they must so declare the fact. *Long v. McCabe & Hamilton*..... 422
8. TRIAL—PROVINCE OF COURT AND JURY—PRIMA FACIE CASE—SHIFTING BURDEN OF PROOF—QUESTIONS OF LAW. Where the burden of proof is shifted from the plaintiff to the defendant by a *prima facie* case sufficient to overcome a presumption in favor of the defendant and is then shifted back to the plaintiff by defendant's counter evidence, plaintiff's *prima facie* case must, on demurrer to the evidence, be measured by defendant's evidence, and determined as a matter of law in the light of defendant's explanations. *Long v. McCabe & Hamilton*..... 422
9. TRIAL—NONSUIT—CREDIBILITY OF WITNESS—PROVINCE OF COURT. Although the evidence of a witness for plaintiff makes out a *prima facie* case, the trial court sitting without a jury is not bound to believe the witness, and may grant a nonsuit where, on cross-examination, the witness was shown to be unreliable. *King County v. Whittlesey* 206
10. TRIAL—MISCONDUCT OF JUDGE—COMMENTS ON EVIDENCE. Comment on rejected evidence is not unlawful comment on the evidence. *Manhattan Building Co. v. Seattle* 226
11. TRIAL—INSTRUCTIONS—TESTIMONY AND EVIDENCE. It is not a valid objection to instructions that the word "testimony" was used in place of the word "evidence." *Scherrer v. Seattle*..... 4
- 12-14. TRIAL—INSTRUCTIONS. It is not error to refuse to give requested instructions covered in the general charge. *Passage v. Stimson Mill Co.* 661
Kinnane v. Conroy..... 651
State v. Simmons..... 132

TRIAL—CONTINUED.

15. **TRIAL—REQUESTS—INSTRUCTIONS.** It is not error to refuse to give an instruction in the form requested, if given in language of the court's own choosing. *Rangenier v. Seattle Electric Co.*..... 401
16. **TRIAL—CONSTRUCTION OF CHARGE AS WHOLE.** Error in isolated instructions is not ground for reversal, if the instructions are correct when considered as a whole. *Manhattan Building Co. v. Seattle* 226
17. **TRIAL—FINDINGS OF FACT—NECESSITY.** Findings of fact are not essential to support a decree in an equity case. *Schlossmacher v. Beacon Place Co.* 588

TRUSTS:

- Cancellation of instrument upon disavowal of trust, see **CANCELLATION OF INSTRUMENTS**, 2.
- Evidence of resulting trust, see **COMPROMISE AND SETTLEMENT**, 2.
- Accrual of action to cancel deed made in trust, see **LIMITATION OF ACTIONS**, 1.

UNDUE INFLUENCE:

- As ground for cancellation of instruments, see **CANCELLATION OF INSTRUMENTS**, 3.
- Affecting validity of will, see **WILLS**, 1.

VACATION:

- Of divorce and settlement between parties to suit, see **DIVORCE**, 3-6.
- Sale on execution, see **EXECUTION**.
- Of judgment, see **JUDGMENT**, 2, 4, 5.
- Of streets or alleys, see **MUNICIPAL CORPORATIONS**, 8.
- Judgment effecting vacation of deed recorded after suit, see **QUIETING TITLE**, 4.
- Tax judgment, see **TAXATION**, 2, 3.

VALUE:

- Fraud in representing value of land, see **FRAUD**, 1, 4, 5, 7.

VARIANCE:

- In action for injuries through defect in street, see **MUNICIPAL CORPORATIONS**, 10.

VENDOR AND PURCHASER:

- Compensation of broker procuring conveyance, see **BROKERS**, 2, 3.
- Assumption of debt by purchaser of mortgaged chattels, see **CHATEL MORTGAGES**.
- Fraud in mutual rescission of contract of purchase, see **COMPROMISE AND SETTLEMENT**, 4.
- Injunction to prevent replat or sale of dedicated park, see **DEDICATION**, 1.
- Merger of contract upon acceptance of deed, see **DEEDS**, 2.

VENDOR AND PURCHASER—CONTINUED.

- Purchasers at sale on execution, see **EXECUTION**, 3.
- Sale of deceased wife's half of community to pay debts, see **EXECUTORS AND ADMINISTRATORS**, 3.
- False representation as to price in sale of land, see **FRAUD**, 1, 4, 5, 7.
- Authority of wife to surrender contract acquiring community rights, see **HUSBAND AND WIFE**, 2.
- Sale of Indian lands, see **INDIANS**.
- Rate of interest on recovery of money paid on contract to buy land, see **INTEREST**.
- Sale of leasehold interest in state lands to satisfy assessment as deprivation of property without due process of law, see **MUNICIPAL CORPORATIONS**, 3-5.
- Rights and liabilities of brokers, see **PRINCIPAL AND AGENT**.
- Transfers of ownership of personal property, see **SALES**.
- Specific performance of contract, see **SPECIFIC PERFORMANCE**.

1. **VENDOR AND PURCHASER—RESCISSION BY VENDEE—FRAUD OF AGENT—MISREPRESENTING LAND.** The purchaser of lots is entitled to relief for fraud where it appears that an agent, authorized to sell and provided with a plat indicating a park that did not exist, showed the lots as staked on the ground, and the park, and after a temporary contract was made and money paid, the stakes shown were moved and a new plat filed, cutting off part of the lots shown as desirable for a building site, and platting the park site into lots, affecting the value of the lots sold. *Nelson v. Title Trust Co.* 258
2. **SAME—DEFENSES—NEGLIGENCE OF VENDEE.** In such a case, the fact that the new plat was filed before the contract was consummated, and that the contract recited that the purchaser had examined the lots as replatted, would not preclude a recovery because of negligence, where the plaintiff lived a long distance from the lots, was not aware of the change, and was misled into signing the contract. *Nelson v. Title Trust Co.* 258
3. **SAME—CONTRACT "TO SELL"—STIPULATION FOR QUITCLAIM DEED—EFFECT—CONSTRUCTION.** Where a contract for the sale of land stipulated that the vendor "will sell to" the vendees and that the vendees "will purchase" the land described, making time of the essence, and provided for a forfeiture in case of nonpayment, and that upon full payment and request, the vendor "shall make . . . a quitclaim deed to said premises," the vendor has obligated himself both "to sell" the land and to make the deed, and the execution of a quitclaim deed without having title to the land, does not absolve him from his obligation "to sell"; in which case the vendee can recover the purchase money paid. *Davis v. Lee*..... 330
4. **SAME—CONTRACTS—CONSTRUCTION—ERASURE OF PRINTED FORMS.** In such a case, the fact that in the printed form of contract, the words "a deed to said premises" were erased and "a quitclaim deed" substituted in ink, does not show an intent to limit the contract to the legal effect of a quitclaim deed; since there would be no incon-

VENDOR AND PURCHASER—CONTINUED.

- sistency in the contract "to sell the premises," and since under a liberal rule of construction, a quitclaim in such case is in effect a bargain and sale deed or a "deed," and effectual under the statute to convey title. *Davis v. Lee*..... 330
5. VENDOR AND PURCHASER—REMEDIES OF PURCHASER—ACTION FOR BREACH—CONTRACT—RESCISSION BY VENDEE—EVIDENCE—SUFFICIENCY. Findings upon conflicting evidence that a contract for the purchase of land had been mutually rescinded and was not breached by a subsequent sale to another, are supported and will not be reversed on appeal, where it appears that the contract was dated January 19, ten days was allowed to complete the deal, and the property was sold to a third party February 3d, after repeated interviews without completion of the contract, the vendor claiming that the vendee had orally rescinded for inability to perform, and where it appears that the value was probably not more than the purchase price, \$22,500, one witness placing it less, and a \$20,000 option to a third party having recently been permitted to expire, and there having been no great appreciation in value. *Stewart v. Davies*..... 96
6. VENDOR AND PURCHASER—RESCISSION BY VENDEE—DEFECTS IN TITLE—WAIVER OF OBJECTION. Objection to a title for want of identification of a person in the chain of title, who conveyed without signing her middle initial, is waived by failing to call attention to such want of identification, when asking for the correction of certain defects. *Cummings v. Dolan*..... 496
7. SAME—DEFECT IN TITLE—CLOUD—MORTGAGE BY STRANGERS. The existence of mortgages upon property, given by mistake by strangers to the title, are not clouds on the title warranting rescission by the vendee for want of a marketable title, especially after such strangers cured the objection by quitclaim deed. *Cummings v. Dolan*.... 496
8. SAME—PLEADING—NECESSITY OF PLEADING WANT OF ACCESS. A vendee cannot refuse to close the deal for want of any ingress or egress to the property where that fact was not pleaded. *Cummings v. Dolan* 496
9. SAME—"MARKETABLE" TITLE. A contract for a marketable title only calls for one that is reasonably free from doubt. *Cummings v. Dolan* 496
10. VENDOR AND PURCHASER—AGREEMENT "TO SELL" LAND—WARRANTY. An agreement "to sell" land is a contract to sell a title, and implies an engagement to make a good title, in the absence of a stipulation to the contrary. *Davis v. Lee*..... 330
11. SAME—OPTION—PAYMENT OF CONSIDERATION—EVIDENCE—SUFFICIENCY. Upon an issue as to the payment of \$50 for an option, the evidence conclusively shows that the payment was made, where the defendants drew therefor and the same was paid through banks and deposited to defendants' credit, and the defendants' attorney was

VENDOR AND PURCHASER—CONTINUED.

authorized to, and did, write a letter acknowledging the deposit and offering repayment upon a return of the option. *Palmer v. Clark* 345

12. **VENDOR AND PURCHASER—TITLE OF VENDOR—OBJECTIONS BY VENDOR—ESTOPPEL TO URGE DEFECTS—ACTION PERFECTING VENDOR'S TITLE—SPECIFIC PERFORMANCE.** Where purchasers of real estate had refused to accept a title because of defects in an administrator's sale of the interests of minor heirs, yet insisted on holding possession and that the vendor perfect his title, they cannot, in an action brought by the vendor against all interested parties to quiet and assure his title and for specific performance, urge defects in the administrator's sale which are not urged by the heirs after they were duly made parties to the action, and who failed to except to, and are concluded by, findings in favor of the vendor, quieting his title; since the judgment declaring the vendor's title perfect concludes all the parties in interest. *Wiley v. Verhaest* 475
13. **VENDOR AND PURCHASER—NOTICE OF EASEMENT—RECORDING CONTRACT—VISIBLE USE.** The purchaser of real estate is charged with notice of a right of way by open and visible use of the easement although the contract therefor was not recorded. *Kalinowski v. Jacobowski* 359
14. **VENDOR AND PURCHASER—OPTION—ACTION FOR DAMAGES—COMPLAINT—AMENDMENT—TENDER OF PERFORMANCE.** In an action for damages for breach of an option contract to sell land, sold by defendants to a third party before expiration of the option, it is error to require the complaint to be amended to show what tender of performance was made by plaintiff; since tender was not necessary after defendants had incapacitated themselves from performing. *Palmer v. Clark* 345
15. **SAME — PLEADINGS — AMENDMENT — DEPARTURE—ABANDONMENT OF CAUSE.** An amended complaint in an action for damages for breach of an option contract to convey land (required by the court to show a tender of performance by plaintiff) is not an abandonment of the original cause of action by reason of its showing certain new proposals relating to the purchase price, and a tender thereof by plaintiff, where the amended complaint set up the same contract as the original complaint, and alleged the same breach by the defendants' conveyance to a third party before expiration of the option. *Palmer v. Clark* 345
16. **SAME—DEFENSES—PURCHASER'S INABILITY TO PERFORM.** Financial inability of the plaintiff to pay the purchase price is not a good defense to an action for damages for the breach of an option given upon defendants' land, subsequently sold by defendants to a third party before expiration of the option. *Palmer v. Clark* 345

VENUE:

Jurisdiction of courts, see **COURTS**.

VERDICT:

Review on appeal or writ of error, see **APPEAL AND ERROR**, 24-27.
Inadequate or excessive damages, see **DAMAGES**, 3, 6; **DEATH**.
Irregularities or defects ground for new trial, see **NEW TRIAL**.

VERIFICATION:

Of claim or statement of mechanics' lien, see **MECHANICS' LIENS**, 4.

VICE PRINCIPALS:

See **MASTER AND SERVANT**, 7.
Negligence of flagman in exercise of duty, see **CARRIERS**, 15.

WAIVER:

See **ESTOPPEL**.
Of error, see **APPEAL AND ERROR**, 20.
Action for damages as waiver of right to rescission, see **CANCELLATION OF INSTRUMENTS**, 5.
Of objections to service of process, see **EMINENT DOMAIN**, 6.
Waiver of objections to time of bringing action for damages as affecting right of action on indemnity bond, see **INDEMNITY**, 4.
Of restrictions in policy of marine insurance, see **INSURANCE**, 2.
Of right to foreclose, see **MORTGAGES**.
Condition in conditional sale or of forfeiture for breach, see **SALES**, 8.
Of objections to title of vendor, see **VENDOR AND PURCHASER**, 6.

WARRANTS:

Review as to sufficiency of on application for habeas corpus, see **HABEAS CORPUS**.

WARRANTY:

On sale of goods, see **SALES**, 4, 5, 7.
Authority of agent to warrant title to goods, see **PRINCIPAL AND AGENT**, 5.
Implied warranty of title in contract to convey, see **VENDOR AND PURCHASER**, 10.

WATERS AND WATER COURSES:

Works for protection or improvement of lands, see **DRAINS**.
Exercise of power of eminent domain, see **EMINENT DOMAIN**, 2, 3.

WEAPONS:

Evidence of ownership and possession by deceased, see **HOMICIDE**, 6, 8.

WILLS:

Probate of foreign will, see **EXECUTORS AND ADMINISTRATORS**, 4, 7.
1. **WILLS—EXECUTION—DURESS AND UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY.** The evidence shows that a will in favor of the husband of the testatrix was induced by duress and undue influence, and findings to the contrary will be reversed on trial *de novo* on appeal.

WILLS—CONTINUED.

where three disinterested and credible witnesses swore positively to many threats and constant importunities and intimidation upon the part of the husband, within their personal knowledge or related to them by the testatrix, whereby the testatrix, who had suffered a stroke of paralysis and was feeble and in her last sickness, was impelled to will to her husband property recently inherited by her, and which she wished to will to her daughter, her only living heir, because of her husband's intemperance and the wishes of her deceased son from whom the property was derived, such witnesses being unimpeached and unopposed on essential matters except by the testimony of the husband, who flatly contradicted all of them. *In re Palmer's Will* 644

2. **WILLS—IMPLIED REVOCATION—SUBSEQUENT MARRIAGE OF TESTATOR—PROVISION IN WILL FOR FUTURE WIFE—STATUTES—CONSTRUCTION.** Under Bal. Code, § 4598, providing that marriage revokes a former will of the testator if the wife be living at the time of his death, unless she shall be provided for in the will or in such way mentioned as to show an intention not to make such provision, marriage does not revoke a former will making a bequest in favor of the person who became the wife of the testator, where there was nothing in the will to show a counter intent; revocation of wills by implication not being favored. *In re Adler's Estate*..... 539

WITNESSES:

Review of determination of trial court, as to credibility of witness, see **APPEAL AND ERROR**, 34.

Review of rulings as dependent on prejudicial nature of error, see **APPEAL AND ERROR**, 39, 47.

Cross-examination of expert in action on official bond, see **BONDS**, 2.

Experts, see **CRIMINAL LAW**, 3.

Opinions, see **EVIDENCE**, 3-7.

Opinion of as charging master with notice of servants' incompetency, see **MASTER AND SERVANT**, 6.

Right to limit number as invalidating railroad commission act, see **RAILROADS**, 6.

Compelling attendance before railroad commission, see **RAILROADS**, 3.

Limiting number of witnesses, see **TRIAL**, 2.

Credibility of witness, province of court, see **TRIAL**, 9.

1. **WITNESS—EXAMINATION—RESPONSIVENESS OF ANSWER.** Where a witness is asked if he noticed plaintiff's condition as to sobriety, an answer that he thought he was drunk may properly be stricken as not responsive. *Rangenier v. Seattle Electric Co.* 401
2. **WITNESSES—CROSS-EXAMINATION—SCOPE—RELATION TO MATTERS IN CHIEF AND TO DEFENSE—BROKERS—EVIDENCE.** In an action to recover a broker's commission, defended on the ground that it was subject to the approval of the vendor's wife, who refused to sign, error cannot be predicated upon permitting the defendant to ask

WITNESSES—CONTINUED.

on cross-examination whether plaintiff did not ask the wife to come in and sign the contract; it being within the trial court's discretion and sufficiently connected with the matter in chief relating to the securing of the contract, although it may also have tended to support the defense. *Kinnane v. Conroy*..... 651

3. **WITNESSES—CROSS-EXAMINATION.** It is not error to limit the cross-examination of a prosecuting witness who had dentistry done for the purpose of prosecuting, where the range of inquiry showed the motives of the witness and tested his credibility. *State v. Littooy* 87

WOODS AND FORESTS:

Cutting and floating of logs, see **LOGS AND LOGGING.**

WORK AND LABOR:

Liens for work and materials, see **MECHANICS' LIENS.**

WRITS:

See **CERTIORARI; HABEAS CORPUS; MANDAMUS.**

Ex. J. H.
11/6/09

2.

